Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

CORNELL JONES, III,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Jefferson County

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. (a) Whether silence in response to judicial inquiry may be used as a sentencing factor even where the accused asserts that the response could endanger his life or otherwise asserts his constitutional privileges?

(b) Whether and under what circumstances may a trial judge, during sentencing, engage in judicial inquiry and fact finding and then enhance the sentence based upon an defendant's failure to identify drug sources in open court with media present, when the defendant asserts either lack of knowledge or the prospect of loss of his or his family's life should the information be revealed?

(c) Whether and under what circumstances may a trial judge, during sentencing, engage in judicial inquiry and fact finding and then exercise discretion to enhance sentencing beyond the statutory maximum based, in whole or in part, upon a defendant's failure to identify drug sources in open court with the media present when the defendant asserts either lack of knowledge or the prospect of loss of his or his family's life should the information be revealed?

II. (a) In a predominantly white panel of prospective jurors, whether a lone black prospective juror may be excused for cause under a standard substantially less stringent than white jurors who are sympathetic to the prosecution's position or are friendly with prosecution witnesses?

(b) Whether *Batson v. Kentucky*, 476 U.S. 79 (1986), as a practical matter, precludes considering the use of different standards for minority prospective jurors because they are likely to be dismissed under a minimal showing in a peremptory challenge?

(c) Whether the *Batson* case can be used as a shield to avoid a sensitive inquiry historically required upon a showing of a *prima facie* case of racial exclusion of minorities from a jury or a venire?

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INTRODUCTORY PRAYER

The petitioner respectfully requests that this Court grant a Writ of Certiorari to review the decision of the Seventh District Court of Appeals for the State of Ohio dated June 8, 2010 and the decision of the Ohio Supreme Court denying jurisdiction dated October 27, 2010.

OPINIONS BELOW

The decision and entry issued by the Seventh District Court of Appeals for the State of Ohio was entered on June 8, 2010 (Apx. A), affirming the decision of the trial court with respect to Mr. Jones conviction and sentence[1] and is unreported, 2010-Ohio-2704. The Entry of the Ohio Supreme Court denying jurisdiction was entered on October 27, 2010 (Apx. B) and is unreported, 2010-Ohio-5101.

JURISDICTION

The Seventh District Court of Appeals for the State of Ohio entered its judgment on June 8, 2010 (Apx. A). The Ohio Supreme Court denied jurisdiction to hear a discretionary appeal on October 27, 2010 (Apx. B). A timely application for extension of time to file a petition for a Writ of Certiorari was granted extending time to and including March 26, 2011. The jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

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[1] The Court of Appeals affirmed but vacated a restitution order as plain error. Certiorari is not sought on this portion of the Appellate Court's Order.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Constitution of the United States of America provide:

Amendment V. Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case examines two separate but important issues: First, whether a trial judge at sentencing may use a defendant's refusal at a sentencing hearing to divulge additional information regarding the crime as a reflection of lack of remorse and enhance the sentence? Second, whether the *Batson* case can be used as a shield to avoid a sensitive inquiry historically required upon a showing of a *prima facie* case of racial exclusion of minorities from a jury or a venire.

A jury convicted the Appellant of aggravated trafficking in cocaine and found him a major drug offender. Under Ohio's sentencing scheme, the major drug offender finding vested the trial court with discretion to impose an additional sentence ranging from zero to an additional ten years.

In determining how much, if any, the additional sentence to impose, the trial court held a Sentencing

Hearing and engaged in judicial fact finding. The Hearing was public, with media present including television. Over defense counsel's objection the trial court pressured Appellant to publicly disclose his drug sources and connections and threatened that Appellant's failure to cooperate and publically divulge this information would adversely impact sentencing.[2]

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[2] The Mitigation and Sentencing Hearing, at 21-28, included the following exchange:

The Court: Okay. There are some things that I need to know and the first one is where did the drugs come from? I know Detroit but where in Detroit, and who?

The Defendant: I couldn't tell you if my life depended on it.

The Court: That means you don't know or you won't tell?

The Defendant: I don't know.

....

The Court: Okay. You understand that in a case like this there is a range this case is worth, you move up and down the range, and it would probably help you if you were to cough up a name that I believe. They probably already know but I don't know. You're not going to do that?

Mr. Pierce: Your Honor, can I say due to the nature of this type of crime for my client to make a public disclosure of that kind could put his life in jeopardy. I'm not saying at some point in the future he can't work with...

The Court: I'm not going to sentence in the future. I'm not going to give him credit for telling and then hope he tells. I am open to lots of suggestions but I want to know who sent kilo's into Jefferson County.

....

Ms. Keenan: Your Honor, we'll ask the Court to recall at trial the testimony through the tapes...

The Court: Supposed to be his cousin or something, right?

....

The Court: So you need to come up with a name and one fairly quickly so I don't think you made it up. I need to know who it is.

The Defendant: I don't have a whole name.

....

The Court: If this was some $20.00 buddy buy I would believe that maybe nobody knows who everybody is. But for $56,500.00 he knows whose hand he put it in. He knows whose hand he put two kilo's of cocaine in.

....

Mr. Pierce: I have to tell you it's been my personal experience in working with Defendants in the African American community in Cleveland that it is indeed very common for these guys to refer to each other as cousin and not be related at all. That is an absolute fact. That's not him making that up. So it's very possible—

The Court: I don't dispute that but it's going to be a hard sell to me that he went from here to Detroit and randomly found somebody he didn't know who it was, put $56,500.00 in their hand, got up to Detroit, a five hour trip, up and back in about ten hours, so there was no messing around up there and it all kind of happened by chance and by accident.

Mr. Pierce: My client continues to maintain he doesn't know the full name. Sometimes in these cases people deliberately mask—

The Court: Let's make it easier. The names on the ledger—can't tell me you don't know that.

The Defendant: What do you want me to tell you?

The Court: I want to know who are they.

The Defendant: I can't do that in front of everybody.

The Court: Do we want a recess?

The Defendant: I'm sorry, I can't do that. You're asking me to put my life in danger.

....

The Court: Let's get back to where the drugs came from. That's a biggy. .... There's a way you know how to get a hold of him. You were supposed to go Wednesday. That trip blew up and you went Friday. You have a way to get in touch with, contact, make arrangements.

....

The Court: One more shot--names on the ledger.

The Defendant: I have to save my life and my family's life. You going to protect us?

The Court: You're going to be fairly hard to get to. I can't imagine anybody will be mad at your wife. At least one of these people brought $12,000 worth of cocaine into this community. Somebody kicked in twelve grand?

....

The Court: I'd kind of like to know who it was that financed $12,000 of cocaine in Jefferson County.

....

Appellant personally and through counsel repeatedly objected to this inquiry noting that such a disclosure would place his life in danger and endanger his family. *Id.* Mr. Jones was sentenced to sixteen years in prison despite the fact that this was his first felony conviction. The judge made clear that enhancement was conditioned on failure to disclose. In contrast, one white co-defendant was sentenced to two years, the other white co-defendant who had a significant felony record was sentenced to thirteen years.

Mr. Jones' first felony conviction stood in sharp contrast to the rest of his life. He was known as a family man who worked hard as an auto mechanic and popular local DJ, cared for his invalid uncle, was nonviolent and religious, did not use drugs.[3] The Mayor of Steubenville even wrote a letter asking for leniency and described Mr. Jones as a "gentleman". (Tr. 7-3-08 at 4, 6-11).

Mr. Jones is a black African American. The lone Black in the venire, Ms. Jackson, was dismissed for cause without Defense counsel asking questions. (Apx. C 47a-52a). However, Ms. Jackson never stated she

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The Defendant: I can't do that. I'm sorry.

Mr. Pierce: Just Your Honor, that I know the Court is disturbed by my client's inability or unwillingness to give full disclosure in the sentencing. I just want to emphasize this is a level of this business where people really do get killed when they rat other people out and I think the Court needs to seriously take that into consideration.

[3] In fairness he apparently experimented in 2002 and was convicted for misdemeanor marijuana in West Virginia.

could not judge fairly or render a prosecution verdict if the evidence warranted, which is the standard in Ohio for dismissal for cause. Rather, Ms. Jackson only testified that she knew Mr. Jones (how well was never explored) and it would be difficult to send Mr. Jones to jail. She was struck for cause (Apx. C 50a-51a). Over defense objection to dismissal for cause the prosecutor stated she was dismissing the juror for cause for a new 'race neutral' reason to wit, "she looked uncomfortable".

In contrast, a white male who acknowledged knowing the Judge and one of the testifying police officers was not excused until he specifically stated "I'd probably say he's guilty" (Tr. 6-26-08 at 20) and the Appellant had to use a peremptory challenge on a white female though she was a friend of a witness's mother (*Id.* at 33).

In a post trial hearing for reconsideration evidence was produced that despite the fact that black African Americans ("Blacks") comprise 5.68 percent of the population of Jefferson County, only around one percent ever gets called as part of the juror pool or venire. The assistant prosecutor who tried Mr. Jones confirmed the percentages testifying that in the 11 to 20 juries she tried only two (2) Blacks were empanelled (Apx. E 103a-104a). Thus, black jurors were only seated between .8 to 1.5%, assuming alternates are not counted. Of those two juries only one convicted (*Id.* at 104a). Furthermore, Chapter President of the NAACP testified at the same hearing that Blacks make up a disproportionate share of persons charges with felonies and/or received harsher plea bargains.

The Ohio Appellate Court overruled the Constitutional challenge by applying Ohio's Criminal Rule 24(C) and state statute Revised Code Section 2313.42(J) (Apx. A 23a-24a). However, this rule and statute are matters of general application and not specifically designed to address Equal Protection challenges. The court also rationalized its decision by holding that:

> In any event, the state only exercised one of its four peremptory challenges. ... Thus, had the trial court denied the challenge for cause, the state most certainly would have utilized a peremptory challenge. Since the state had already put race-neutral reasons on the record and there was no indication that the reason was pretextual. The challenge would have withstood a *Batson* challenge as well. See *Batson v. Kentucky* (1986), 476 U.S. 79. 96-98.

(Apx. A at 25a) However, the trial court never fully engaged in a *Batson* analysis to determine if there was pretext and never addressed the issue of racial motivation in the challenge for cause.

REASONS FOR GRANTING THE WRIT

I. A Trial Court May Not Compel the Defendant to Answer Questions or to Consider Defendant's Silence Against Him at Sentencing

In *Blakely v Washington*, 542 U.S. 296, 306-07 (2004), Justice Scalia writing for the majority of the Court stated, "[t]he jury could not function as circuit breaker in the State's machinery of justice if it were

relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." In the instant case the trial court at sentencing assumed the role of inquisitor and demanded in open court, with media present, the names of Mr. Jones' drug contacts to mitigate enhancement of sentence.[4] Condemning judicial inquisitions at sentencing or elsewhere is not limited to Justice Scalia's well reasoned decision in *Blakely*. The jurisprudence of the Court has long been concerned that justice can be lost when not tempered by restraint.

The observation in the *Blakely* case is consistent with a line of federal cases that implicates Fifth Amendment and extending its protections to the sentencing phase of the trial. *Estelle v. Smith*, 451 U.S. 454, 468 (1981), stated:

> The Court has held that the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. *In re Gault*, 387 U.S. 1 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'" *Culombe v. Connecticut, supra,* at 581, quoting 2 Hawkins, Pleas of the Crown 595

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[4] See footnote 2

> (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.
>
> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. *See Green v. Georgia*, 442 U.S. 95, 97 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

Estelle v. Smith supra at 462-63.

The right to Fifth Amendment privileges is not lost at the sentencing phase. As held in *Mitchell v. United States,* 526 U.S. 314, (1999), "A sentencing court may not draw an adverse inference from a defendant's silence in determining facts relating to the circumstances and details of the crime. The normal rule in a criminal case permits no negative inference from a defendant's failure to testify. ... A sentencing hearing is part of the criminal case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing." *Id.* syllabus at #2 and pgs. 327-30.

> Where the sentence has not yet been imposed, a defendant may have a legitimate fear of

adverse consequences from further testimony. As the Court stated in *Estelle:* "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U.S., at 463. *Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.*, at 462 (emphasis in original) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-582 (1961)). The Government itself makes the implicit concession that the acceptance of a guilty plea does not eliminate the possibility of further incrimination. In its brief to the Court, the Government acknowledges that a defendant who awaits sentencing after having pleaded guilty may assert the privilege against self-incrimination if called as a witness in the trial of a codefendant, in part because of the danger of responding "to questions that might have an adverse impact on his sentence or on his prosecution for other crimes." Brief for United States 31.

The Fifth Amendment, by its terms, prevents a person from being "compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. To maintain that sentencing proceedings are not part of "any

criminal case" is contrary to the law and to common sense.

Mitchell v. United States, 526 U.S. 314, 326-27 (1999). *See also Michigan v. Tucker*, 417 U.S. 433, 440 (1974).[5]

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[5] The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. *See* L. Levy, Origins of the Fifth Amendment (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1 (1949); 8 Wigmore § 2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil -- a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann, supra,* at 428.

Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock, supra;* to civil proceedings, *McCarthy v. Arndstein*, 266 U.S. 34 266 (1924); to congressional investigations, *Watkins v. United States*, 354 U.S. 178 354 U.S. 178 (1957); to juvenile proceedings, *In re Gault*, 387 U.S. 1 (1967); and to other statutory inquiries, *Malloy v. Hogan*, 378 U.S. 1 (1964). The privilege has also been applied against the States by virtue of the Fourteenth Amendment. *Ibid.*

Tucker at 440.

Following the *Blakely* case, the Ohio Courts held that a statute is unconstitutional under the Sixth Amendment if it requires a judge to engage in judicial fact finding and enhance a sentence on the basis of facts not found by a jury or admitted by the defendant. *State v. Foster* (2006), 109 Ohio St. 3d 1. However, a jury is not necessary for a judge to consider "relevant information about an offender's prior conviction that is part of the judicial record." *State v. Hunter* (2009), 123 Ohio St. 3d 164 (syllabus). The *Hunter* decision also held that a judge has greater flexibility in considering additional facts when a defendant waives a jury trial or there is a stipulation. *Id.* at 169-70.

However, the decision in the instant case provides a new exception that swallows the interrelated rules of the *Blakley* and *Estelle* cases and flies in the face of the holding in the *Mitchell* case by suggesting that the trial judge is merely measuring remorse. This new exception provides a means for the sentencing judge to consider matters otherwise prohibited if packaged, or rationalized, as a consideration of lack of remorse. The Ohio appellate decision stated in pertinent part:

> ¶{22} Moreover, appellant's refusal to provide names could be considered as tending toward a lack of genuine remorse, which is a proper sentencing factor. See R.C. 2929.12(D)(5), (E)(5). See, also, *State v. Barger*, 2d Dist. No. 2006-Ohio-12, 2006-Ohio-5559, ¶26-27 (refusal to identify drug source is a sentencing factor). Although appellant felt it was too dangerous to provide names to show remorse due to the public nature of the sentencing hearing, his sentencing took place a week after the jury found him guilty, giving him time to

> provide names in private if he wished to do so as a gesture of remorse. ....

As it stands, Ohio's reading of the Fifth Amendment allows the sentencing judge to elevate form over substance and not only consider the defendant's silence as a factor for sentencing enhancement but, further, allows the sentencing court to publicly compel a response even where the defendant is presented with the Hobson's choice of enhanced sentencing or death from retaliation.

In fairness, federal circuits are also split as to whether silence may be considered as a measure of lack of remorse, with the majority holding it may not be used. Compare *United States v. Mikos*, 539 F.3d 706, 718 (7th Cir. 2008) (holding that during a capital sentencing a defendant's silence may be considered regarding lack of remorse), with e.g. *Lesko v. Lehman*, 925 F.2d 1527, 1544-45 (3d Cir. 1991) (holding that during a capital sentencing a defendant's failure to apologize may not be considered regarding lack of remorse) and *United States v. Roman*, 371 F.Supp.2d 36, 50 (D.P.R. 2005) (holding lack of remorse may not be proved using "information that has a substantial possibility of encroaching on the defendants' constitutional right to remain silent"). However, none of these cases involve judicial inquisition. Regardless, the split of federal authority and the uses of silence as a sentencing factor in some of Ohio's appellate districts emphasize that this case involves a constitutional question of great public or general interest.

Mr. Jones was subsequently sentenced to 16 years incarceration, a six year enhancement. He had no prior felony convictions and only had a prior marijuana

conviction in 2002. The other persons in the car, both white, received substantially less sentences. One white co-defendant was sentenced to two years, the other thirteen despite a significant criminal record.

The Court of Appeals found only that "it may be preferable to refrain from acting as inquisitor" but that Mr. Jones should have voluntarily provided the names before the open court exchange.[6] As a result, the type of judicial role criticized in the *Booker*, *Estelle*, *Tucker* and *Mitchell* cases is now authorized in Ohio so long as the sentencing judge is careful in articulating a politically correct rationale. The same reasoning is manifest in what is, for now, a minority of Circuits.

II. Once a *Prima Facie* Case of Racial Bias in Juror Selection Is Raised a Court Must Engage in a Sensitive Factual Inquiry Addressing the Core Constitutional Issues

A trial or appellate court when faced with a *prima facie* showing of racial discrimination in juror selection cannot sanitize the process by simply digressing into analysis of rules of general application that applies to grant broad discretion in an otherwise neutral arena. Further, any court should not avoid the central question in an equal protection challenge of juror selection and excuse potential discrimination by simply observing that there were peremptory challenges yet to be used and the imaginative

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[6] Though Counsel has some issues with the implications it should be noted the record reflects that the prosecution never made a presentence inquiry regarding producing names. The entire matter came from the bench in open court with cameras rolling.

prosecutor was able to articulate some reason that was not race based.

Batson v. Kentucky (1986), 476 U.S. 79, was never intended to be a mechanism for an imaginative prosecutor to disguise an illicit purpose or to provide an excuse for the courts to avoid a possibly unpleasant soul searching analysis.

The Court has long held that purposeful or deliberate exclusion of jurors on the basis of race violates equal protection under the Fourteenth Amendment. E.g. *Strauder v. West Virginia*, 100 U.S. 303 (1880). The Court has characterized the commitment as "unceasing efforts to eradicate racial discrimination in procedures used to select the venire from which individuals are drawn", *Batson* supra at 85. Indeed the Court has cautioned that the cost of racial discrimination in juror selection not only violates the Equal Protection rights of the accused but also of the prospective juror and the community as a whole. *Id.* at 87.

Recognizing that purposeful or deliberate discrimination is often sophisticated and seldom flagrant, *id.* at 88-89, the Court has fashioned a shifting burden that necessities greater scrutiny in the selection process as the indicia of discriminatory motivation rises. Although the *Batson* case did not articulate the test for showing racial discrimination in a challenge for cause, it did indicate the types of indicia that raises to hurdle for the prosecution when challenged on the exercise of a peremptory. These indicia included: "total or seriously disproportionate exclusions of Negroes from jury venires . . . is itself such an unequal application of the law . . . as to show

intentional discrimination". *Id.* at 93 quoting and *Washington v. Davis*, 26 U.S. 229, 241(1976) and *Akins v. Texas*, 325 U.S. 398, 404 (1945); *see also Batson* at 95 ("this Court has found a *prima facie* case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn"); "a 'pattern' of strikes against black jurors" *id.* at 97; in the particular jurisdiction, members of his race have not been summoned for jury service over an extended period of time. *Id.* at 94 citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). In *Batson* the Court observed that,

> Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis,* 426 U.S. at 242. We have observed that, under some circumstances, proof of discriminatory impact may, for all practical purposes, demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds.

Batson at 93. Additionally, the trial judge refused a defense request for recess late in the day so defendant could decide whether to testify and then told the jury the court would like to finish the case "today". These and other indicia of discrimination were presented in the instant case.

Under *Batson* the Ohio courts and any other "court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson* at 93 quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). However, rather than engaging in

that sensitive inquiry, the Ohio courts used *Batson* as a shield to avoid the difficult analysis of a sensitive inquiry by rationalize the striking of a lone black juror would have been struck anyway under a peremptory challenge.

Hence the unanswered question from the *Batson* case remains; whether, in situations that suggests a *prima facie* case of racial discrimination in juror selection, can a court avoid the 'sensitive inquiry' by rationalizing that the prosecution would have removed the juror anyway under a peremptory challenge that could have withstood a lesser hurdle under the *Batson* case?

CONCLUSION

For the reasons set forth above the jurisdiction of the United States Supreme Court should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CASE NOS. 08 JE 20/08 JE 29

[Filed June 8, 2010]

STATE OF OHIO,	)
	)
PLAINTIFF-APPELLEE,	)
	)
- VS -	)
	)
CORNELL JONES, III,	)
	)
DEFENDANT-APPELLANT.	)
	)

OPINION

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07CR155A.
JUDGMENT:	Conviction and Sentence Affirmed; Restitution Order Vacated.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Thomas Strauss Prosecuting Attorney Attorney Jane Hanlin Assistant Prosecuting Attorney 16001 State Route Seven Steubenville, Ohio 43952
For Defendant-Appellant:	Attorney John Scaccia 536 West Central Avenue, Second Floor Springsboro, Ohio 45066

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 8, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant Cornell Jones III appeals from the judgment of the Jefferson County Common Pleas Court, which sentenced appellant after a jury found him guilty of drug trafficking and drug possession with major drug offender specifications. The issues on appeal concern the six-year additional sentence for the major drug offender specification, the validity of a restitution order, the denial of a continuance, the exclusion for cause of an African-American juror due to her knowing appellant and expressing difficulty with sitting in judgment of him, the informant's testimony identifying appellant's handwriting, alleged prosecutorial misconduct in

closing arguments, and ineffective assistance of counsel.

¶{2} For the following reasons, appellant's assignments of error are overruled. However, the restitution order is vacated as it was plain error to use restitution to reimburse the police department for expending funds to discover evidence against appellant, e.g. the informant's wages and buy money. Appellant's conviction and sentence are affirmed in all other aspects.

STATEMENT OF THE CASE

¶{3} Steubenville police officers were informed by a neighboring task force that one of their confidential informants had information that appellant was attempting to collect enough money from buyers to travel to Detroit to purchase two kilograms of cocaine. The informant, who had known appellant since 1999, then worked with Steubenville police. She placed recorded telephone calls to appellant. Police watched her meet with appellant once in his Chevrolet Suburban and once in his BMW.

¶{4} At the second meeting on Friday, November 23, 2007, police videotaped the meeting and recorded the conversation. (Tr. 175, 183). The informant provided appellant with $4,000 in police money to fund the Detroit drug buy from which she was to receive 5.5 ounces of cocaine. (Tr. 77, 177-178, 183, 196). She informed appellant that she was going to resell her share to buyers in Pennsylvania. (Tr. 79-80). He informed her that he would be back from Detroit between 7:00 and 7:30 a.m. on Saturday. (Tr. 95). The police watched appellant leave town in his Acura with

codefendants, Nicholas Blackburn and Thomas Staudacher. (Tr. 186).

¶{5} A search warrant was issued for appellant's vehicle upon his return from Detroit. His Acura was stopped upon reentering town at 6:00 a.m. on Saturday, November 24, 2007. (Tr. 166). Two bricks of cocaine, weighing nearly two kilograms, were discovered in a duffle bag in the trunk. Appellant's wallet contained a piece of paper, referred to by the prosecution as a ledger, which contained various amounts with corresponding nicknames. (Tr. 193-194). For instance, a shortened form of the informant's first name was listed next to "4000," and "Cor" (presumably short for Cornell) was listed next to "12000." (Tr. 196, 199, 215). The informant identified the handwriting on the ledger as belonging to appellant. (Tr. 102-103).

¶{6} Appellant was indicted for drug trafficking, a first degree felony due to the amount of cocaine weighing over 1000 grams. See R.C. 2925.03(A)(2), (C)(4)(g). Three forfeiture specifications, representing each vehicle used, were added to this count. In addition, appellant was indicted for drug possession, also a first degree felony due to the amount of cocaine. See R.C. 2925.11(A), (C)(4)(f). Both counts were accompanied by a major drug offender specification.

¶{7} The case was tried to a jury on June 26, 2008. Testimony was presented by the officers involved, the informant, a forensic scientist, and appellant's two co-defendants. Co-defendant Blackburn testified that he slept in the backseat while appellant drove to Detroit. (Tr. 108). He revealed that he provided $1,000 to appellant and was to receive approximately 14 grams of cocaine in return. (Tr. 110-111). Co-defendant

Staudacher testified that he also "kicked in some money" to purchase the cocaine. (Tr. 150, 155).

¶{8} The jury found appellant guilty on both counts. They also found that he was a major drug offender. The jury found that the Acura and the BMW were subject to forfeiture but the Suburban was not.

¶{9} On July 10, 2008, the court sentenced appellant to a mandatory sentence of ten years on each count and an additional six-year sentence for the major drug offender specifications for a total of sixteen years in prison. The court ordered restitution in the amount of $5,600: $4,000 for the money provided to the informant by the police and $1,600 for the money paid to the informant for her services to the police department. Although the Suburban was not subject to forfeiture, the court noted that execution may issue against such vehicle to fulfill the restitution order.

¶{10} Appellant filed a timely appeal, which resulted in case number 08JE20. On August 18, 2008, he filed a motion to reconsider through new counsel. On September 18, 2008, the trial court denied appellant's post-trial motion to the extent that it could be considered a post-conviction petition, also noting that there was no such thing as a motion to reconsider. See, also, Crim.R. 33(B) (new trial motion must be filed within fourteen days after verdict). Appellant filed a notice of appeal from that entry, resulting in case number 08JE29. His brief primarily raises issues in 08JE20; the brief only vaguely refers to racial concerns arising from the proceedings which resulted in 08JE29. We proceed to address the contents of the assignments of error.

ASSIGNMENT OF ERROR NUMBER ONE

¶{11} Appellant sets forth eight assignments of error, the first of which provides:

¶{12} "THE TRIAL COURT UNCONSTITUTIONALLY IMPOSED A SIX (6) YEAR ENHANCEMENT IN CORNELL JONES' SENTENCE."

¶{13} Appellant briefly raises various unrelated arguments regarding the six-year additional sentence imposed for the major drug offender specification. First, appellant contends that the additional six-year sentence cannot be imposed because a court cannot impose a sentence based upon facts not found by the jury, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

¶{14} If a person trafficks in or possesses 1,000 or more grams of cocaine, he is a major drug offender and the sentencing court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under R.C. 2929.14(D)(3)(b). See R.C. 2925.03(C)(4)(g) (trafficking); R.C. 2925.11 (C)(4)(f) (possession); R.C. 2929.01(W) (defining major drug offender). According to R.C. 2929.14(D)(3)(b), after ascertaining if R.C. 2929.14(D)(3)(a) is applicable, the court may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court makes the findings set forth in R.C. 2929.14(D)(2)(a)(iv) and (v). These divisions provide:

¶{15} "(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

¶{16} "(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense." R.C. 2929.14(D)(2)(a)(iv) and (v).

¶{17} These two divisions are the same as those in the repeat violent offender specification sentencing provision in R.C. 2929.14(D)(2)(a). The *Foster* Court found that these two divisions require unconstitutional fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶75-78. 83 (previously contained in divisions (D)(2)(b)(i) and (ii)). However, rather than eliminating penalty enhancements for repeat violent specifications, *Foster* merely severed and excised these fact-finding divisions. Id at ¶88, 97-98. "*After the severance, judicial fact-finding is not required before imposition of additional penalties for repeat-violent-offender and*

major-drug-offender specifications." (Emphasis added). Id. at ¶ 99.

¶{18} The Supreme Court has recently reaffirmed that this type of penalty enhancement, even in the absence of divisions (D)(2)(a)(iv) and (v), still exists after the *Foster* severance. *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, ¶27 (*Foster* excised the portion of the repeat violent offender statute that required judicial fact-finding), ¶35. This district has also explained that the factors in (D)(2)(a)(iv) and (v) need no longer be considered before enhancement. *State v. Davis*, 7th Dist. No. 08MA152, 2009-Ohio-5079 (a repeat violent offender case). See, also, *State v. Adams*, 11th Dist. No.2006-L-114, 2007-Ohio-2434, ¶22-27 (a major drug offender case).

¶{19} Accordingly, the trial court was not required to make the findings declared unconstitutional in *Foster*. Thus, appellant was a major drug offender if he possessed or sold over 1,000 grams of cocaine. The jury found the existence of this specification. As such, no statutorily-required unconstitutional judicial fact-finding occurred in this case.

¶{20} Contrary to an alternative argument presented under this assignment of error, it is also not improper judicial fact-finding for the trial court to express its belief that appellant knew the name of his source and his buyers. This is merely the court using information gleaned at trial to make conclusions about appellant's knowledge, and a sentencing court is permitted to express its impressions derived from trial. See *State v. Simmons*, 7th Dist. No. 07JE22, 2008-Ohio-3337, ¶11-14 (it is statutorily-required specific judicial fact-finding that is prohibited, not the

discretionary expression of the existence of various sentencing considerations).

¶{21} Appellant similarly complains that the court should not have asked him to disclose his source and his buyers at sentencing or offered to give him credit for providing names. (Sent. Tr. 21-24, 30-31). Although it may be preferable to refrain from acting as an inquisitor, the questioning here was not "cruel and unusual punishment" as appellant suggests.

¶{22} Moreover, appellant's refusal to provide names could be considered as tending toward a lack of genuine remorse, which is a proper sentencing factor. See R.C 2929.12(D)(5), (E)(5). See, also, *State v. Barger*, 2d Dist. No. 2006-Ohio-12, 2006-Ohio-5559, ¶26-27 (refusal to identify drug source is a sentencing factor). Although appellant felt it was too dangerous to provide names to show remorse due to the public nature of the sentencing hearing, his sentencing took place a week after the jury found him guilty, giving him time to provide names in private if he wished to do so as a gesture of remorse. On the topic of remorse, it should also be noted that appellant's allocution did contain an apology but seemed more concerned with recognizing certain spectators, seemingly reminding them that they owed him. (Sent. Tr. 20-21).

¶{23} Appellant next contends that the sentencing court ignored the mitigating evidence. To the contrary, the court recognized that this was a non-violent offense and that appellant was well-liked. See R.C. 2929.12(C)(3). However, the amount of drugs, being nearly twice the amount needed for a major drug offender specification, was a major factor for the court. See R.C. 2929.12(A) (any other factor the court finds

relevant to achieving the purposes and principles of sentencing), (B) (any other factors making offender's conduct more serious than conduct usually constituting the offense). The court rationally surmised that it was unlikely that this was appellant's first involvement with trafficking because it was unrealistic to believe that a brand new trafficker could drive to Detroit after collecting $56,500 from various local financial sources and pick up nearly two kilograms of cocaine from a prearranged supplier. (Sent. Tr. 30). See R.C. 2929.12(D).

¶{24} The court noted how much money was involved for the purchase, how much would be made on the resale, and how little appellant had to do to make such a large amount of money. General and specific deterrence were strong considerations. (Sent. Tr. 29-30). See R.C. 2929.11(A). The court also focused on the fact that this offense was a result of organized criminal activity with appellant as the organizer. (Sent. Tr. 29). See R.C. 2929.12(B)(7).

¶{25} The court did not ignore the mitigating evidence. Rather, the court found the mitigating evidence was outweighed by the opposing evidence, which is the very function of the sentencing court. See R.C. 2929.11; R.C. 2929.12. It must also be remembered that the ten-year sentence was mandatory and that, on the additional sentence, the court could have, but did not, impose ten years on the major drug offender specification.

¶{26} Lastly, appellant complains that his sentence was not proportional to his codefendants' sentences. He points out that he is African-American and his codefendants are white. A felony sentence shall be

consistent with sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). See, also, R.C. 2929.11(C) (a sentence shall not be based upon race). However, there is no requirement that codefendants receive the same sentence. *State v. Cardamone*, 8th Dist. No. 92235, 2009-Ohio-5361, ¶34, citing *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, ¶8 (10th Dist.).

¶{27} As for Staudacher's thirteen-year-sentence, there are a myriad of reasons distinguishing the culpability of Staudacher from that of appellant. It was appellant, not Staudacher, who negotiated the resale with the informant while police recorded the transaction. The informant provided $4,000 in police funds to appellant, not Staudacher. Appellant indicated that he was the one who knew the source in Detroit. Appellant organized the trip. He collected the funds in Steubenville. He was also the one who was to distribute the 5.5 ounces to the informant upon their return. Appellant seems to have contributed at least $12,000 to the purchase compared to the $4,000 which the state argued that Staudacher contributed.

¶{28} Moreover, appellant utilized his own vehicle to drive to Detroit. The drugs were found in what could reasonably be concluded was appellant's duffel bag. A ledger, showing the various contributions and said to be written by appellant, was found in appellant's wallet. Appellant voiced his intent to purchase two kilograms, whereas Staudacher believed they were only going to pick up one kilogram. (Tr. 150). Although Staudacher's criminal record was said to be more extensive than appellant's, appellant did have a prior drug offense. See R.C. 2929.12(D)(2)-(3). Finally, appellant did not admit his guilt and did not negotiate

a plea, whereas Staudacher pled guilty and negotiated a plea requiring the state to recommend thirteen years in prison.

¶{29} As for codefendant Blackburn, he was sentenced to only two years. However, he contributed only $1,000 to the drug buy. Additionally, he admitted his guilt to the police, and he negotiated a plea with the state whereby he pled to one count of attempted complicity to drug trafficking. This offense is a second degree felony which is a lesser degree of offense than appellant was convicted of, and he was convicted of only one offense compared to appellant's two offenses. Moreover, Blackburn negotiated his plea so that the state was required to recommend this two-year sentence. The court merely imposed the sentence recommended by the state. As such, there is a plethora of evidence showing that appellant justifiably received a greater sentence than his codefendants, and there is no evidence that appellant received a greater sentence than Staudacher or Blackburn due to his race.

¶{30} Although some may believe that an additional six-year sentence after a mandatory ten-year sentence is unwarranted for a non-violent offender, the legislature has authorized such punishment, and it is for the trial court thereafter to use its long-standing discretion to fashion the proper sentence for each defendant. See R.C. 2929.12(A). We do not substitute our judgment for that of the trial court on such matters. In this case, the sentence is not contrary to law, and it does not appear that the court abused its discretion in weighing the sentencing factors. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912 (setting forth the standard of review in multiple opinions). See, also, *State v. Gratz*, 7th Dist.

No. 08MA101, 2009-Ohio-695, ¶8; *State v. Gray*, 7th Dist. No. 07MA156, 2008-Ohio-6591, ¶17. For all of these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{31} Appellant's second assignment of error provides:

¶{32} "THE TRIAL COURT COMMITTED PREJUDICL [SIC] ERROR WHEN IT IMPOSSED [SIC] A FINE ON INDIGENT APPELLANT AND/OR SEIZED THE SUBURBAN UNLESS MR. JONES' FAMILY PAID THE STATE RESTITUTION."

¶{33} First, we address appellant's argument that the court should not have ordered $5,600 in restitution because restitution is improper if the defendant is indigent. In general, restitution is a financial sanction available at sentencing. R.C. 2929.18(A). The test for imposing restitution is not indigency in general, but it is whether the offender is able to pay the financial sanction or is likely to be able to pay it in the future. See R.C. 2929.18(E). Thus, before imposing a financial sanction such as restitution, the court shall consider the offender's present and future ability to pay the amount of the sanction. R.C. 2929.19(B)(6), citing R.C. 2929.18.

¶{34} The court need not hold a separate hearing on the matter. See R.C. 2929.18(E). And, there is nothing in the statute requiring the court to set forth its consideration of ability to pay in the present or future. *State v. Gibson* (1998), 80 Ohio St.3d 626, 635. Thus, if there is some evidence on the record regarding ability or inability to pay, we can presume the

sentencing court considered the topic. See *State v. Jones*, 7th Dist. No. 07CO46, 2009-Ohio-4392 (appellate court presumes consideration of sentencing factors from silent record), citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶18, fn. 4; *State v. Cyrus* (1992), 63 Ohio St.3d 164, 165; *State v. Adams* (1988), 37 Ohio St.3d 295, 297.

¶{35} Regardless, there is not only evidence on the record here concerning appellant's ability or inability to pay, but the record demonstrates the court's consideration of appellant's present and future ability to pay $5,600 in restitution. That is, the court pointed out that appellant's Suburban, which the jury found not subject to forfeiture, could be executed upon to satisfy the judgment. (Sent. Tr. 31). In addition, the court heard arguments that appellant was indigent and that there were liens on his three vehicles. (Sent. Tr. 31-32). The court was informed that appellant had been employed as a disc jockey and in the service department of a car repair shop and that he provided a high level of customer satisfaction. (Sent. Tr. 11).

¶{36} The state set forth evidence that appellant contributed $12,000 cash to the drug buy. Although one could conclude that this utilized his available funds, one could also rationally believe that one would not contribute every available cent to finance this transaction. Furthermore, the court noted that appellant talked about hiring private counsel before trial. He also thought about doing so before sentencing. (Tr. 280). In fact, "potential retained counsel" introduced himself on the sentencing record, albeit stating that he believed his fee would mostly be paid by family. (Sent. Tr. 33).

¶{37} Most notably, the court waived the mandatory fine, which would have been at least $10,000 per offense. See R.C. 2929.18(A)(3)(a)($20,000 maximum fine for first degree felony), (B)(1) (drug offense carries mandatory minimum fine of one-half the maximum). Thus, the court determined under R.C. 2929.18(B)(1) that appellant was indigent and unable to pay the mandatory fine. This shows that the court considered appellant's present and future ability in determining that he established that he could not pay a $10,000 mandatory fine plus a $5,600 restitution order but that he did have the ability to pay the $5,600 restitution order alone.

¶{38} As for contentions regarding unfairness to appellant's wife, these contentions were not raised below and cannot be considered as fact for purposes of appeal. Along with these contentions, appellant complains that the sentencing court cannot execute upon his Suburban to satisfy the restitution order without a further hearing. R.C. 2929.18(D) states that after a restitution order, the interested party can bring an action to obtain execution of the judgment in various statutory ways including execution against property of the judgment debtor or attachment of the property of the judgment debtor (who is defined as the person against whom the restitution order is issued). R.C. 2929.18(D)(1), citing, e.g., Chapter 2329 and Chapter 2715.

¶{39} Thus, appellant's argument is technically correct: statutorily, the party to whom restitution is owed must bring an action to execute upon the judgment. However, here the court's order merely stated that "execution may issue against" his Suburban for the restitution order. The court did not

actually order execution on the Suburban, which is a step th proper party would have to take next.

¶{40} There is, however, another issue with the restitution order. That is, there is no proper party to the restitution order. As will be analyzed below, the state was not a victim for purposes of the restitution order. Although appellant did not raise the issue below and does not raise it here, it is a problem worthy of application of the plain error doctrine.

¶{41} Pursuant to Crim.R. 52(B), plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. This rule allows the appellate court, at the request of appellate counsel or sua sponte, to consider certain unobjected to errors. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604. Plain error can be recognized to prevent a manifest miscarriage of justice where, but for the error, the outcome of the proceeding clearly would have been otherwise. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, ¶61.

¶{42} The Eleventh District has applied the plain error doctrine to raise this specific restitution issue sua sponte. *State v. Pietrangelo*, 11th Dist. No. 2003-L-125, 2005-Ohio-1686. The Fourth District has used plain error to address this specific restitution issue where it had been raised on appeal but had not been raised below. *State v. Samuels*, 4th Dist. No. 03CA8, 2003-Ohio-6106, ¶9.

¶{43} Pursuant to statute, the court can impose restitution against the offender payable to the victim of the offender's crime or any survivor of the victim in an amount based on the victim's economic loss. R.C.

2929.18(A)(1) (also reiterating that such amount shall not exceed the amount of economic loss suffered by the victim as a direct and proximate result of the commission of the offense). The Fourth and Eleventh Districts defined "victim" as used in this statute as a person or entity that was "the object" of the crime. *Pietrangelo*, 11th Dist. No. 2003-L-125 at ¶15; *Samuels*, 4th Dist. No. 03CA8 at ¶5, citing Black's Law Dict. (5th Ed. 1979) 1405.

¶{44} Thus, the government or a police department can be a victim if, for instance, they suffer vandalism or embezzlement at the hands of the offender. *Pietrangelo*, 11th Dist. No. 2003-L-125 at ¶15; *Samuels*, 4th Dist. No. 03CA48 at ¶5. However, the government or a police department is not a victim merely because they expended funds in order to gather evidence against the offender. Id. The Fourth and Eleventh Districts have thus ruled that R.C. 2929.18(A) does not contemplate restitution for the voluntary advancement of funds to pursue a drug buy. Id.

¶{45} The Eleventh District pointed out that many federal courts have held that the government agencies using their funds to purchase drugs are not "victims" as contemplated by the federal statute on restitution. *Pietrangelo*, 11th Dist. No. 2003-L-125 at ¶16, citing *United States v. Cottman* (C.A.3, 1998), 142 F.3d 160, 168; *United States v. Khawaja* (C.A.11, 1997), 118 F.3d 1454; *United States v. Meacham* (C.A.6, 1994), 27 F.3d 214, 218-219; *United States v. Gibbens* (C.A.1, 1994), 25 F.3d 28, 32-33; *Gall v. United States* (C.A.6, 1994), 21 F.3d 107, 108.

¶{46} The Eleventh District also pointed out that the majority of state courts addressing this particular issue "have likewise concluded that the government is not a victim entitled to restitution where public moneys are expended in pursuit of solving crimes, as these expenditures represent normal operating costs." *Pietrangelo*, 11th Dist. No. 2003-L-125 at ¶17, quoting *State v. Sequiera* (Haw.App. 2000), 93 Haw. 34, 995 P.2d 335, 344-345 (listing California, Illinois, Minnesota, Nevada, New Jersey, New York, and Wisconsin among the states following this rule).

¶{47} In addition, the Third District has followed *Pietrangelo* and *Samuels* to find that the government is not a victim under the restitution statute merely because it expended funds in some manner as a result of the defendant's offense. See, e.g., *State v. Ham*, 3d Dist. No. 16-09-01, 2009-Ohio-3822, 3822 ¶48-49 (cannot order restitution of costs incurred by humane society to care for defendant's dog); *State v. Wolf*, 176 Ohio App.3d 165, 2008-Ohio1483, ¶40-41 (fire departments are not victims of the arson and cannot seek restitution for firefighting); *State v. Toler*, 173 Ohio App.3d 335, 2007-Ohio-6967, ¶11-12 (cannot order restitution of extradition costs incurred by sheriff's department).

¶{48} Finally, we note that R.C. 2929.18(A)(5) provides for *reimbursement* to the government for the costs of *sanctions*. The existence of this provision shows the statutory distinction between restitution to victims and reimbursement to the government for certain listed expenses. For these reasons, we hereby vacate the restitution order.

ASSIGNMENT OF ERROR NUMBER THREE

¶{49} Appellant's third assignment of error alleges:

¶{50} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANT A CONTINUANCE OR RECESS TO DEVELOP ISSUES RELATED TO DEVELOP ISSUES [SIC] AND LATER TO DECIDE WHETHER TO TKE [SIC] THE STAND IN HIS OWN DEFENSE."

¶{51} Appellant complains that he was twice denied a continuance resulting in prejudicial error. The grant or denial of a continuance is a matter that is entrusted to the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. Thus, an appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. Id. There is no mechanical test for evaluating the exercise of this discretion. Id. However, some of the factors to consider include: the length of the delay requested; other continuances requested and received; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or a delaying tactic; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. Id. at 67-68.

¶{52} First, appellant states in a nebulous one-sentence argument that he should have been granted a continuance of the suppression hearing because defense counsel had learned that a motion to suppress had been filed, three days before, in a case pending against appellant in West Virginia. At the suppression

hearing, defense counsel stated that appellant just advised him five minutes before that the West Virginia suppression motion asked "to suppress one of the triggering actions that started this case." Counsel also advised that appellant "believes that it's unfair for him to not be tried in chronological order. That is to say since the West Virginia offense occurred prior to this offense he thinks in fairness he ought to face trial in the West Virginia offense before he faces his trial here." (Supp. Tr. 3).

¶{53} The judge reminded counsel that he was only presiding over the suppression hearing (due to procedure of having a different court hear suppression than the one that issued the warrant in cases where the motion contests probable cause to issue the warrant). The judge advised that appellant would have to address any requests for continuances to the judge assigned to the case. (Supp. Tr. 3-5). The suppression judge allowed a fifteen-minute recess to discuss the matter with the prosecutor or the judge assigned to the case. (Supp. Tr. 5). It was reasonable for the suppression judge to defer to the judge assigned to the case.

¶{54} However, there is no indication that the matter was actually presented to the judge assigned to the case. The suppression transcript does not evidence whether they actually appeared before the judge assigned to the case or whether that judge actually denied a continuance. Similarly, the docket shows that no motion for continuance of the suppression hearing was filed or ruled upon.

¶{55} In any event, it was unreasonable for appellant to tell his attorney five minutes before a

suppression hearing that he wished to continue the matter or that he filed a suppression motion in his other case three days ago. Moreover, there is no indication how the evidence sought to be suppressed in West Virginia relates to the evidence sought to be suppressed in the case at bar. Finally, appellant has not established that he was prejudiced. For instance, there is no indication that his West Virginia suppression motion was successful, which was the entire reason for him seeking this continuance.

¶{56} The second issue raised under this assignment of error is the trial court's refusal to recess at 4:10 p.m. on the first day of trial so that the defendant had more than a few minutes to consult with family members and advisors about whether he wanted to testify. The court noted that appellant had months to decide if he wanted to testify. The court then stated that appellant could have a few minutes to make his decision. (Tr. 228). Appellant did not thereafter testify. Closing arguments and jury instructions were presented, and the jury returned a verdict at 5:44 p.m.

¶{57} Initially, we note that appellant had been granted a continuance of more than a month once before. See *Unger*, 67 Ohio St.2d at 67-68. As the court pointed out, the decision whether to testify should have been considered throughout the months preceding trial and throughout the hours of trial itself. The evidence was not complex. Nothing was said to be surprising. A brief recess to confer with counsel and other advisors could rationally be considered sufficient.

¶{58} In addition, appellant was twenty minutes late to court that morning. (Tr. 6). He was out on bail

pending trial. His need for another night to decide whether to testify could be viewed as a delaying tactic. The state was opposed to the continuance. (Tr. 228). The trial ended up finishing that evening. A delay until the next morning could be seen as inconveniencing the court, the prosecutor, the rebuttal witnesses, and the jurors. See *Unger*, 67 Ohio St.2d at 67-68.

¶{59} There are no unique facts making an overnight continuance necessary or reasonable merely to decide whether one wishes to testify in one's own defense. As such, the court did not abuse its discretion in granting a brief recess rather than an overnight continuance. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{60} Appellant's fourth assignment of error provides:

¶{61} "APPELLANT WAS DENIED A FAIR TRIAL BY EXCLUSION OF JURORS IN HIS CASE AND GENERALLY ON THE BASIS OF RACE."

¶{62} When three venire persons stated that they heard or read about the case in the news, they were asked whether they were willing to set aside this information and judge the case solely on the evidence. (Tr. 14-15). The only African-American venire person answered, "I know the defendant, so." The state queried, "Would that make it difficult for you to sit in judgment of him today?" to which this potential juror responded, "It would make it difficult for me to send him to jail." (Tr. 15). The potential juror also answered affirmatively when the state asked if it was fair to say

that she might be a better juror for a different case than the one involving appellant.

¶{63} The court anticipated objections regarding this juror sitting on the panel and asked for comments. Defense counsel opined that the state should be required to state a race-neutral reason for excusing this potential juror. (Tr. 16). The state pointed out that the juror looked uncomfortable, that she knew the defendant, and that she revealed that it would be difficult to sit in judgment of him. (Tr. 16-17). The court then excused the juror. (Tr. 17).

¶{64} Appellant now argues that the court's dismissal of the only African-American for cause denied him a fair trial. He states that cause was not manifest and asks us to compare her statements with that of the white panel members.

¶{65} Pursuant to Crim.R. 24(C), a person called as a juror may be challenged for the following causes:

¶{66} "(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial. * * *

¶{67} "(14) That the juror is otherwise unsuitable for any other cause to serve as a juror."

¶{68} Statutorily, good cause for challenging any person called as a juror includes the situation where "he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2313.42(J). "A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Williams* (1997), 79 Ohio St.3d 1, 8.

¶{69} Here, the potential juror's answers established that she was biased in favor of appellant, and the court was not satisfied that she could render an impartial verdict. She essentially answered the question about whether she could decide the case on the evidence by stating that she cannot because she knows appellant. She agreed that it would be difficult to sit in judgment of appellant due to this knowledge of him. She admitted that she was unsuitable for these reasons to serve as a juror in this case.

¶{70} The trial court occupied the best position to view the demeanor, gestures, and voice inflection of this venire person and to judge her level of bias and her certainty and credibility as to her expression of bias. Id. Under these circumstances, knowing a defendant and expressing that it would be difficult to render judgment against him is sufficient evidence for a court to exercise its discretion to excuse the juror for cause. See *State v. Sheppard* (1998), 84 Ohio St.3d 230, 235 (where potential juror was acquainted with victim and had seen the defendant around but says he can be impartial, the denial of challenge for cause was upheld based upon deference to the trial court, but the

Supreme Court stated, "caution suggests sustaining the challenge").

¶{71} In any event, the state only exercised one out of its four peremptory challenges. (Tr. 31, 33, 42, 47-48). Thus, had the court denied the challenge for cause, the state most certainly would have utilized a peremptory challenge. Since the state already put race-neutral reasons on the record and there was no indication that the reason was pretextual, the challenge would have withstood a *Batson* challenge as well. See *Batson v. Kentucky* (1986), 476 U.S. 79, 96-98 (race-neutral reason need not rise to level of challenge for cause). See, also, *State v. Davis*, 7th Dist. No. 08MA152, 2009-Ohio-5079, ¶53-58 (peremptory challenge of African-American upheld where prosecutor did not approve of juror's past expressions of authority and where prosecutor disbelieved the juror's statement that he knew nothing of the defendant's car and foot chase which took place near the juror's house).

¶{72} Finally, we must point out that the African-American venire person was not treated differently than the white jurors who expressed that they could not be impartial. Most notably, one of the other potential jurors who had heard about the case in the news stated that he knew the detective. (Tr. 14-15, 20). When asked if this would keep him from basing his decision on the evidence, he stated that it would because the detective assisted him by conducting a "gun bust" at one of his properties and also noted that he would probably say the defendant was guilty because he was victimized in the past. (Tr. 10). *The defense* successfully asked that this venire person be excused for cause. (Tr. 21).

¶{73} Similarly, when asked whether she would have a problem listening to the evidence due to personal experience, another potential juror answered that she would want to convict appellant and stated that she did not know if she could lay her feelings aside. (Tr. 23-24). Once again, *the defense* successfully challenged this potential juror for cause. (Tr. 24).

¶{74} Thus, the court treated the white venire persons the same as the similarly situated African-American venire person. No differential treatment due to race is evident. In accordance, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FIVE

¶{75} Appellant's fifth assignment of error states:

¶{76} "TESTIMONY REGARDING THE IDENTITY OF THE HANDWRITING ON THE ALLEGED LEDGER WAS WITHOUT ROPER [SIC] FOUNDATION AND NOT ADMISSIBLE."

¶{77} The informant testified that she was originally going to ride to Detroit with appellant until the trip got postponed, after which she provided appellant with $4,000 to purchase 5.5 ounces of cocaine for her to resell. (Tr. 80). She advised that she had known appellant since 1999. (Tr. 75). She had a romantic relationship with him in the past. (Tr. 97-98). Their most recent relationship was a friendship. She was also storing a truck for appellant. (Tr. 101). She said his nickname is Third (presumably short for Cornell Jones, III). (Tr. 76).

¶{78} The informant was presented with a document labeled State's Exhibit Number Two and was asked if she could identify the handwriting on that document, which was later characterized as appellant's ledger (as it contained monetary amounts labeled with names). The informant responded, "It looks like Third's." (Tr. 102). As the evidence bag had blue lines and preprinted writing all over the front of it, the state asked that the document be removed from the bag so she could view the other side. (Tr. 102-103). After this was done, the state asked if she could identify the handwriting to which she responded, "Third's." (Tr. 103).

¶{79} The defense did not object. Instead, defense counsel cross-examined her on the matter. She disclosed that the police showed her the document after appellant's arrest, told her they found it in his wallet, and asked her to decipher the names written on it. When asked if appellant wrote her letters, she answered that he had. (Tr. 104). She was also asked whether she was a certified documents examiner. (Tr. 104-105).

¶{80} On redirect, she again stated that appellant has written her letters in the past. She agreed that this past exposure to his writing was the source of her handwriting identification. (Tr. 105).

¶{81} On appeal, appellant complains that the informant was not an expert at handwriting analysis and that the familiarity exception is not applicable because the foundation laid was insufficient. Appellant states that the informant's testimony about previously viewing appellant's writing was vague and non-specific.

¶{82} If a witness is not testifying as an expert, testimony in the form of opinions or inferences is limited to that which is: (1) rationally based on the witness's perception, and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Evid.R. 701. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Evid.R. 901(A). An example of authentication or identification under the rule is a non-expert opinion as to the genuineness of handwriting based upon familiarity not acquired for purposes of the litigation. Evid.R. 901(B)(2).

¶{83} As appellant failed to object to the informant's identification testimony, any error is waived. See Evid.R. 103(A)(1) (error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected, and a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context). Due to this waiver, we can review the claimed lack of foundation only for plain error. *State v. Allen* (1995), 73 Ohio St.3d 626, 635 (claim that various items were not properly authenticated was waived absent plain error). Plain error can be recognized to prevent a manifest miscarriage of justice where, but for an error affecting substantial rights, the outcome of the proceeding clearly would have been otherwise. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3545, ¶61. See, also, Crim.R. 52(B).

¶{84} We first note that even if an objection had been made at the appropriate time, the state would have had the opportunity to provide a more thorough foundation after the objection. See *State v. Brazzon*, 11th Dist. No. 2001-T-0050, 2003-Ohio-6080, ¶43 (if evidence is not inherently inadmissible, then there is no plain error as the state may have laid a foundation upon proper objection); *State v. Collier* (July 27, 2000), 8th Dist. No. 76433. A substantial right is not affected if an error is cured. See Evid.R. 103(A)(1). Thus, we need not be concerned with any complaint that some of the foundational elements for the informant's handwriting identification may not have been placed on the record until after she had already identified the handwriting as belonging to appellant. Defense counsel was likely aware of the state's ability to lay a further foundation immediately after an objection, and thus, may have strategically decided to cross-examine on her familiarity with appellant's handwriting, at which point he would have discovered that a motion to strike was not warranted.

¶{85} Here, the informant's testimony was rationally based on her perception and helpful to a determination of a fact in issue. See Evid.R. 701. Her knowledge was not acquired for purposes of litigation. See Evid.R. 901(B)(2). She stated that she knew appellant for eight years, first as a romantic interest and then as friends. She provided him with $4,000 and had plans to drive to Detroit with him. She was storing a vehicle for him at the time of trial. With this history in mind, the receipt of letters from appellant was a significant authentication factor. His past letters to her were also specifically said to be the source of her knowledge concerning what appellant's writing looked like.

¶{86} Thus, she had first-hand knowledge of appellant's handwriting. See *State v. Shakoor*, 7th Dist. No. 01CA121, 2003-Ohio-5140, ¶80-82. There is nothing requiring the state to specifically use or elicit the word "familiar" or "familiarity" in order to establish authenticity under Evid.R. 902. Testimony that one has received letters from a boyfriend in the past and that this is the source of handwriting identification, combined with the actual identification of handwriting on the document as belonging to appellant, can all be construed as an expression of familiarity with appellant's handwriting.

¶{87} Finally, there was ample evidence of appellant's guilt here. See *Allen*, 73 Ohio St.3d at 635. There were recorded conversations. The informant and the codefendants testified. Plenty of evidence showed that appellant organized the trip and gathered the money. Most notably, appellant was stopped with nearly two kilograms of cocaine hidden in a duffel bag in his trunk.

¶{88} Under the totality of the facts and circumstances here, there is no obvious error resulting in a manifest miscarriage of justice. As such, the informant's testimony identifying appellant's handwriting on the ledger is not error, plain or otherwise.

ASSIGNMENT OF ERROR NUMBER SIX

¶{89} Appellant's sixth assignment of error alleges:

¶{90} "THE STATE IMPROPERLY SHIFTED THE BURDEN OF PROOF ON A CERTRAL [SIC] ISSUE IN APPELLANT[']S THEORY OF INNOCENCE."

¶{91} Appellant argues that the state attempted to shift the burden of proof to the defense and thus engaged in prosecutorial misconduct by stating the following in closing arguments:

¶{92} "And then we come back again to this idea about the handwriting analysis. Do you know who else could have called witnesses today? Mr. Jones. Mr. Jones had subpoena powers. Mr. Jones has the power to bring his own witnesses into this courtroom. If Mr. Jones thought for one second that that ledger wasn't in his handwriting, do you know who could have brought you an expert today?"

¶{93} At that point, the defense objected, and an off-the-record discussion was held. (Tr. 248). The state then continued:

¶{94} "What will be pointed out to you in the instructions is that he doesn't have to call witnesses, that the burden is on the State to prove that he's guilty and I think we've met that burden but he can call witnesses. He could have brought you -- if he thought it would work, he could have brought you his own handwriting analysis and say 'Hey, that's not the handwriting of Cornell Jones III' but he didn't and so even though the burden is on the State, what you['re] left to wonder in part is why not because you know exactly what that would have shown, exactly what makes sense with the rest of this case, that the ledger that was in his wallet, in his trunk, next to his gym bag, next to the dope is his." (Tr. 249).

¶{95} In general, the prosecutor is entitled to a certain degree of latitude during closing arguments. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. In

reviewing a claim of prosecutorial misconduct in closing arguments, we determine whether the remarks were improper and if so whether they prejudicially affected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

¶{96} Comments are not prejudicial or erroneous where the defense invited or opened the door to the comments. See *State v. Brown* (1988), 38 Ohio St.3d 305, 316-317. Here, the contested statements were made in the state's *rebuttal*. The state was specifically responding to the following statements in the defense's closing argument:

¶{97} "They can't even bother to take that little extra step and send it [the ledger] to a certified documents examiner? The BCI agent says 'Yeah, we have those guys, they're in another facility but we have them.' And how -- how big of a burden would that be to take one little extra step of effort to make sure that you weren't going to deny an innocent man of his freedom? A couple extra days investigation? I mean, the case is only 6-1/2 months old. Cases go on for years while they're investigated.

¶{98} "So, I think that that is not something to be shrugged off. That is a major deficiency in this case * * * Has the prosecution in this case given us the greatest amount of certainty that they could have offered us? No. There's no handwriting exemplar. Anybody could have made that list. Nobody saw my client write it. * * * That would be such an easy thing to do to give us the certainty to make us comfortable that we weren't depriving a potentially innocent man of his freedom." (Tr. 241-242).

¶{99} The state's rebuttal was a rational response to this closing. Thus, the defense opened the door to and invited the state's comment that the defense could have conducted a handwriting analysis as well. See *Brown*, 38 Ohio St.3d at 316-317.

¶{100} In any event, the state may comment upon the defendant's failure to present evidence. *State v. Clemons* (1998), 82 Ohio St.3d 438, 452, citing *State v. Williams* (1986), 23 Ohio St.3d 16, 19-20; *State v. Bies* (1996), 74 Ohio St.3d 320, 326. Thus, commenting that a witness, other than the accused, did not testify is not improper. *Clemons*, 82 Ohio St.3d at 452, citing *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193 (where the state asked the defendant why he did not call his girlfriend to support his testimony). Specifically, the state can comment that the defense did not call an expert to testify. *Clemons*, 82 Ohio St.3d at 452 (the state can comment that a defendant could have called an expert to establish that he blacked out). For these reasons, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SEVEN

¶{101} Appellant's seventh assignment of error urges:

¶{102} "APPELLANT SUFFERED SUBSTANTIAL PREJUDICE AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL."

¶{103} In seeking reversal for alleged ineffective assistance of trial counsel, the defendant must establish deficient performance which caused prejudice to the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d

136, 142. We thus apply a two-pronged test: deficiency and prejudice.

¶{104} In order to establish that counsel's performance was deficient, the defendant must demonstrate that the performance fell below an objective standard of reasonable representation. *State v. Keith* (1997), 79 Ohio St.3d 514, 534. Counsel is presumed competent. *State v. Thompson* (1987), 33 Ohio St.3d 1, 10. We do not use hindsight to second-guess trial tactics as there is a wide range of professional competence and of acceptable trial strategy. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

¶{105} To then demonstrate that he was prejudiced by the deficient performance, the defendant must prove that there exists a reasonable probability that were it not for counsel's serious error, the outcome of the proceedings would have been different. *Keith*, 79 Ohio St.3d at 534. In evaluating prejudice, we thus consider whether our confidence in the outcome is undermined. *Bradley*, 42 Ohio St.3d at 142.

¶{106} Appellant alleges three instances of ineffective assistance of counsel. First, he complains about defense counsel's handling of the testimony presented by the state's forensic expert from the BCI laboratory. This expert testified that he analyzed the substance within the two packages discovered in appellant's trunk. He explained that he weighed the substance and then performed a presumptive chemical test and a microcrystalline test to ensure the presence of cocaine. (Tr. 127-128). He then used a gas chromatograph mass spectrometer to test that the substance did not contain separate components. (Tr.

128-129). He also used FTIR instrumentation to check his results. (Tr. 129).

¶{107} He concluded that due to his twenty-five years of experience at BCI and the results of the four tests, "I can tell you State's Exhibit 3, items 1 and 2, are cocaine." (Tr. 129). He was then asked if he is able to testify what each package weighs. He answered affirmatively and went on to testify that item 1 weighed 984 grams and item two weighed 1,000 grams. (Tr. 130-132). Finally, the expert answered affirmatively when the prosecutor asked:

¶{108} "And based upon your years of experience, your education and your training are you confident in your findings that those packages are respectively 984 grams of cocaine and 1,000 grams of cocaine?" (Tr. 132).

¶{109} On cross-examination, defense counsel asked about his error rate, and the expert disclosed that in twenty-five years at BCI, he has never "missed doing a chemical test" and noted that they conduct random retesting by different chemists and also by an outside agency. (Tr. 133). After the expert's testimony, the state moved to admit the related exhibits. The court asked if there was any objection, to which defense counsel responded out of the hearing of the jury:

¶{110} "I'm going to object to the introduction because I didn't hear the prosecutor ask him if his findings were to a reasonable degree of scientific certainty which I think is the standard for expert witnesses in the case like this, at least that's the custom and practice I've always dealt with. You know,

that's -- that's my view but there are certain magic words for expert witnesses and in this case it's reasonable degree of scientific certainty." (Tr. 140).

¶{111} The court then had its probation officer run after the expert to return him to the stand. (Tr. 140-141). At that point, the prosecutor asked the expert:

¶{112} "I believe this was clear before but we want to make absolutely sure, are you able to state with a reasonable degree of scientific certainty that your findings as to item 1 contained 984 grams of cocaine?"

¶{113} The expert answered affirmatively to this question and an identical question regarding item 2 containing 1,000 grams of cocaine. (Tr. 141). The court then asked if defense counsel still had objections to the exhibits, and defense counsel stated that he did not and that he was withdrawing his earlier objection. (Tr. 142).

¶{114} Appellant initially claims that counsel failed to put his objection on the record at the side bar and complains that counsel tipped off the state that they should chase down the expert to ensure that he testified to a reasonable degree of scientific certainty. He cites only the following out-of-context statements made before the expert was recalled to the stand:

¶{115} "[Defense counsel]: I'm sorry.

¶{116} "[Prosecutor]: No, no. That's okay.

¶{117} "THE COURT: You're doing you job. That's what we want." (Tr. 141).

¶{118} However, it seems appellant skipped past page 140 of the transcript. As set forth above, counsel did object on the record, and the specific reasons for the objection were recorded as well. (Tr. 140). Contrary to appellant's suggestion, counsel did not secretly prompt the prosecutor or the court to call the witness back in order to "sabotage" his client. Rather, counsel properly voiced an objection, and the court made its own decision to have a probation officer run after the expert to have him place the "magic words" on the record.

¶{119} Appellant next states that counsel should have objected to the court's decision to allow the expert to be recalled. First, we note that the initial language used by the expert here is distinguishable from that reviewed in the *Holt* and *Shumaker* cases cited by appellant. That is, in *Holt*, the Supreme Court stated that probability, not possibility, is required of an expert witness, noting that "likely" is weaker than "reasonable certainty" or "probability." *State v. Holt* (1969), 17 Ohio St.2d 81, 85-85. In *Shumaker*, the Court again stated that proof of possibility is not sufficient and that probability is required. *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 46, fn.3. In any event, *Holt* is not precisely followed. See *State v. D'Ambrosia* (1993), 67 Ohio St.3d 185, 191 ("possibility" permissible); *State v. Bender* (1988), 40 Ohio St.3d 301, 313 (questioning *Holt* and holding that "more than likely" and "extremely likely" are permissible expressions).

¶{120} Here, the expert testified on initial direct examination that the packages contained cocaine. He expressed that he was "confident" based upon the four tests and his education, training, and twenty-five

years of experience that the substance was cocaine. (Tr. 129, 132). This is more than expressing a possibility and is even more than expressing a probability. See *State v. Jackson* (2001), 92 Ohio St.3d 436, 448 ("reasonable certainty" is synonymous with "probability")

¶{121} Regardless, recalling a witness who had just stepped off the stand is a procedure best left to the trial court's sound discretion. See Evid.R. 611(A) (the trial court can exercise reasonable control over the mode and order of interrogation to effectively ascertain the truth); *In the Matter of L.M.S.*, 6th Dist. No. H-06-037, 2008-Ohio-360, ¶9-10 (it was proper to recall a medical witness to add that the opinion was made within a reasonable degree of medical certainty); *State v. Burneson*, 5th Dist. No. 2008-CA-00076, 2008-Ohio-5888, ¶30-36 (it is within the court's discretion to recall a witness to provide testimony which through error, mistake, or oversight, was not elicited); *State v. Burneson*, 8th Dist. No. 88767, 2007-Ohio-4037, ¶8. See, also, *State v. Spirko* (1991), 59 Ohio St.3d 1, 28 (applying Evid.R. 611(A) to hold that the refusal to grant the defense's request to recall a witness is within sound discretion of the trial court).

¶{122} Here, the expert stated he was confident based upon his experience, education, training, error rate, and testing. The expert was apparently still in the building, and the state had not yet rested its case. Thus, the court cannot be construed as having abused its discretion to control the mode and order of interrogation to effectively ascertain the truth. As such, the failure to object to the court's recalling of the state's expert was not erroneous or prejudicial.

¶{123} We move to appellant's next allegation of ineffective assistance of counsel. Before trial, counsel filed a motion to suppress physical evidence, alleging that the warrant was issued without probable cause. This motion was heard and overruled. At trial, a patrolman executing the search warrant on appellant's vehicle testified that appellant asked him what time the warrant was issued. He advised appellant that the judge signed it at 12:15 a.m. Appellant then advised the officer that they had not yet arrived at their destination at the time the warrant had been issued. (Tr. 166).

¶{124} Appellant now contends that counsel was ineffective by failing to seek pretrial suppression of this statement on Fifth Amendment and *Miranda* grounds. However, the failure to file a motion to suppress can only constitute ineffective assistance of counsel for purposes of the direct appeal when the record demonstrates that the motion was warranted. See *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶208; *State v. Barnette*, 7th Dist. No. 06JE23, 2008-Ohio-1546, ¶31.

¶{125} Here, there is no evidence of coercion on the record. See *State v. Ishmail* (1976), 54 Ohio St.2d 402, 406 (reviewing court can only consider matter on the record). In fact, the officer merely answered a question of fact put forth by appellant to which appellant chose to offer the information that he had not reached his destination at the time the warrant was signed. There is absolutely no indication that an interrogation occurred for purposes of *Miranda*. See *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-301 (*Miranda* is applicable only when the officer elicited the statement during interrogation by express questioning or its

functional equivalent). See, also, *State v. Tucker* (1998), 81 Ohio St.3d 431, 436.

¶{126} Moreover, even if suppression was likely (which it was not shown to be), there is no prejudice for purposes of the ineffective assistance of counsel test unless the defendant establishes a reasonable probability that he would not have been found guilty in the absence of the contested evidence. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389. Here, appellant's statement was not a main factor in his guilt. Rather, the testimony of the officers, the informant, and the codefendants and the discovery of cocaine and the ledger constituted overwhelming evidence against appellant. As such, this argument is without merit.

¶{127} Lastly, appellant complains that defense counsel did not inquire as to whether codefendant Blackburn's confession was freely given to police. Blackburn admitted his role and pled guilty. He testified at appellant's trial that he provided $1,000 to appellant toward the purchase of cocaine. (Tr. 110-111). On cross-examination, defense counsel did attempt to discredit his confession by asking if he initially claimed that he did not provide any money to appellant. (Tr. 114). He insisted that his trial testimony was true, and did not indicate that it or his confession were involuntary. Since there is no indication of coercion regarding this codefendant on the record, error and prejudice cannot be established here. *Ishmail*, 54 Ohio St.2d at 406. See, also, *Drummond*, 111 Ohio St.3d 14 at ¶208. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER EIGHT

¶{128} Appellant's eighth assignment of error concludes:

¶{129} "THE CASE SHOULD BE REMANDED FOR A NEW TRIAL UNDER THE CUMULATIVE ERROR DOCTRINE."

¶{130} Under the doctrine of cumulative error, a conviction can be reversed when the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the errors does not individually constitute cause for reversal. *State v. Garner* (1995), 74 Ohio St.3d 49, 64. This doctrine is inapplicable when the defendant fails to establish multiple instances of harmless error. Id.

¶{131} Here, we did not find multiple instances of harmless error. Even if appellant had established the existence of more than one harmless error at trial, we fail to discern any cumulative effect that would have deprived appellant of his right to a fair trial. There is no right to a perfect trial. This assignment of error is overruled.

¶{132} For the foregoing reasons, the judgment of the trial court regarding appellant's conviction and sentence are hereby affirmed. However, the restitution order is vacated.

Donofrio, J., concurs.
Waite, J., concurs.

APPENDIX B

THE SUPREME COURT OF OHIO

Case No. 2010-1298

[Filed October 27, 2010]

State of Ohio)
)
v.)
)
Cornell Jones, III)
)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Jefferson County Court of Appeals; Nos. 08JE20 and 08JE29)

/s/ Eric Brown
ERIC BROWN
Chief Justice

APPENDIX C

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

APPEAL NUMBER 08-JE-20
APPEAL NUMBER 08-JE-29
CASE NUMBER 07-CR-155A

[Dated June 26, 2008]

STATE OF OHIO	)
	)
Plaintiff	)
	)
vs.	)
	)
CORNELL JONES III	)
	)
Defendant	)
	)

- - -

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF II

Thursday, June 26, 2008

- - -

Transcript of Proceedings of the Jury Trial had in the above-captioned case heard on Thursday, June 26, 2008, held in the Common Pleas Court, Courtroom #1, the Honorable Joseph J. Bruzzese, Jr. presiding, with a Jury of Twelve.

- - -

Susan M. Schweiss
OFFICIAL COURT REPORTER
JEFFERSON COUNTY COURTHOUSE
STEUBENVILLE, OHIO 43952

[p.2]

APPEARANCES:

On Behalf of the State of Ohio:

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16001 State Route 7
Steubenville, Ohio 43952

On Behalf of the Defendant:

Frank Pierce, Esquire
600 Trabar Drive #31
St. Clairsville, Ohio 43950

- - -

* * *

[p.11]

this time.

So far as on the list is concerned, we are going to start calling jurors where we left off last time. So, those who were already called in the last case will be the last to be called in this case just so that you know how that works and we might as well get started.

Oh. Before we get started let's have both tables introduce themselves starting with the State's table.

MRS. HANLIN: Thank you, Your Honor. Good morning. My name is Jane Hanlin. I'm an assistant prosecutor in Jefferson County.

DETECTIVE HANLIN: Good morning. I'm Jason Hanlin. I'm a detective with the Steubenville Police Department.

THE COURT: Defense table.

MR. PIERCE: Good morning. My name is Frank Pierce. I'm Mr. Jones' attorney. My office is in Saint Clairsville, Ohio.

THE DEFENDANT: Hi. My name is Cornell Jones. I'm the Defendant in this case.

THE COURT: Okay. Let's get them all sworn in.

- - -

(The oath was administered to the prospective jurors by the bailiff.)

[p.12]

THE BAILIFF: Billie Roe. Margaret Van Kirk. Troylynn Boggs. Harry Barton, Junior. Donna Jackson. Gregory Wickham. Mary Jo Stetson. Leonard Boyuk. Alex Kamarados. Rocky Comisso. Barbara Cerra. Arthur Koth.

THE COURT: Okay. As you recall from last time, the -- the attorneys get to question each of you with respect to your qualifications to sit in this case.

We already know that you're qualified jurors in general because the jury commissioners took care of that when your names were pulled but just because someone is a qualified juror in general doesn't necessarily mean that they would be the most impartial juror for some particular case.

For example, maybe one of these lawyers is your lawyer. Maybe you know the parties. Maybe you witnessed the scene. Maybe you know -- there could be any one of a number of things that could cause you to have some preconceived notion in this case about how this case or a case like this case should go and that's what jury selection is all about is to try to eliminate that and get the most impartial jury that we can so that both sides can have a fair trial.

As you recall from last time, the State of Ohio has the burden of proof. So, it will always go first. State.

[p.13]

MRS. HANLIN: Thank you, Your Honor. Good morning again. So you've all been through this at least once?

MS. CERRA: No.

MRS. HANLIN: You didn't make it up this far the last time?

MS. CERRA: I've never been here.

MRS. HANLIN: Oh, okay. And as the Judge explained and as maybe some of you have been through, this is the process of jury selection and it's not a process designed to make you feel uncomfortable but rather a process designed to make sure that we find the best 12 jurors for this particular case.

And so we all had the opportunity to review the questionnaires that you filled out when you were notified about jury duty. So, some of the questions may come from there. Again, it's not anything that we're trying to pry, just to see whether or not you can be the most fair and most objective jurors for this case.

This case is about a defendant named Cornell Jones III. He sits at the Defendant's table with his lawyer and the State of Ohio has indicted him for bringing 2 kilograms of powder cocaine from Detroit, Michigan to Steubenville, Ohio in his silver Acura on November 24th of 2007. It was the morning after Thanksgiving.

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There were some media reports I know about this particular case and so I guess the first question that I'll ask you is have any of you heard or read about or know anything about this case prior to coming here today? And you are Ms. Jackson?

MS. JACKSON: (Juror nods head.)

MRS. HANLIN: And can you tell me what you --

MS. JACKSON: Just what was on the news.

MRS. HANLIN: Okay. You're talking about the television news?

MS. JACKSON: (Juror nods head.)

MRS. HANLIN: Okay. Have you read anything about the --

MS. JACKSON: (Juror shakes head.)

MRS. HANLIN: -- the incident at all?

MS. JACKSON: (Juror shakes head.)

MRS. HANLIN: Anybody else that's seen it -- Okay. And let me get my -- you are -- where did he go? Mr. Boyuk.

MR. BOYUK: Yes, just what I read in the newspaper.

MRS. HANLIN: Okay. Do you know anything else about the case other than that?

MR. BOYUK: No, I don't.

MRS. HANLIN: And Mr. Comisso.

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MR. COMISSO: Yes, what I read in the paper and seen on the news.

MRS. HANLIN: Okay. Among the three of you who have heard about it or read about it, would you be willing to set that aside for today's purposes and judge this case just solely what you are going to hear from the witness stand or solely about the evidence that's going to be admitted in this courtroom today regardless of what you've read outside of that?

MR. BOYUK: Yes.

MRS. HANLIN: Okay. And you're Mr. Boyuk.

MR. COMISSO: Yes but I know the Judge and I know the policeman and I knew the other policeman here.

MRS. HANLIN: Okay. And I'll go through the witness list in a little bit and we'll talk about whether that's going to be a problem for you in this case. Okay. And Mrs. Jackson.

MS. JACKSON: I know the Defendant, so.

MRS. HANLIN: Okay. And you've known him prior to today?

MS. JACKSON: (Juror nods head.)

MRS. HANLIN: Would that make it difficult for you to sit in judgment of him today?

MS. JACKSON: It would make it difficult for me to send him to jail.

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MRS. HANLIN: Okay. Do you think that it's fair to say that you might be a better juror for a different case, maybe not this one but a different case than the one that's going to be presented today?

MS. JACKSON: (Juror nods head.)

MRS. HANLIN: Your Honor.

THE COURT: Any objection?

MR. PIERCE: May we approach, Your Honor?

THE COURT: Yes.

- - -

(A Side-Bar Discussion was had between Counsel and the Court out of the hearing of the prospective jurors.)

- - -

OUT OF THE HEARING OF THE JURY:

MR. PIERCE: Judge, since my client is an African-American and the juror who is -- who the State is attempting to excuse is the only African-American among the 12, I would ask that the State lay upon the record a non-racial reason to have her excused.

MRS. HANLIN: Sure. We have no problem with that, Your Honor. Just based upon her own

words, first she looks very uncomfortable being here. She has stated that she knows the Defendant and it would be very difficult

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for her to sit in judgment of him and I believe her exact words, it would be very difficult for her to send him to jail. I think that's a completely race neutral reason to discharge her and by her own words she thinks she would be suited better for another trial.

THE COURT: I think she's excused.

MR. PIERCE: Thank you, Your Honor.

- - -

THE COURT: Okay. Ms. Jackson, you're excused. We'll save you for the next trial. Thank you for coming.

THE BAILIFF: Frederick Long, II.

MRS. HANLIN: Good morning.

MR. LONG: Good morning.

MRS. HANLIN: Have you read or heard anything about this in the news either on the TV or in the newspaper?

MR. LONG: If I have I've totally forgotten all about it.

MRS. HANLIN: Okay. Now, based upon the arrest that was made on November 24th of 2007 the grand jury indicted Mr. Jones on two counts. The first count is possession of cocaine for the 2 kilograms of cocaine that was in the trunk of his Acura. The second charge is a

* * *

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was the one that did the warrant or not.

MR. PIERCE: Right.

THE COURT: Even if some other judge did it --

MR. PIERCE: Okay.

THE COURT: -- the same concern would apply.

MR. PIERCE: Okay.

THE COURT: I don't know if it's much of a concern.

MR. PIERCE: All right. Well, I'll just -- I'll just leave it go.

THE COURT: Anything else?

MRS. HANLIN: No, sir.

MR. PIERCE: No, that' s all I have. I would request if the -- after the exhibits are now taken care of, if the prosecution is going to rest, the -- I'll -- you know, I'll make a Rule 29.

THE COURT: Right. She's rested. So, make your Rule 29.

MR. PIERCE: At this time, Your Honor, the State moves for a judgment of acquittal based on Criminal Rule 29 in that the State has not presented sufficient evidence to find my client guilty.

THE COURT: Okay. It's overruled. I want to talk with Mr. Jones about his right to remain silent.

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Mr. Jones, I'm not trying to talk you into or out of anything but I want to make sure that you understand this concept. The State has rested. So, your case is up. You have the absolute right if you want to to remain silent and say nothing. If you remain silent, which is your absolute right, I'm not going to hold that against you and the jury will not hold that against you and, in fact, I'll instruct the jury that they're not permitted to consider your silence for any purpose. Do you understand that?

THE DEFENDANT : Yes.

THE COURT: If you want to testify -- the other side is if you -- if you want to testify you have every right to do so and if you choose to testify you testify under the same rules that apply to any other witness and your credibility is measured by the same rules

that apply to any other witness and I'll tell the jury that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Whether you testify or not is entirely up to you. You should talk to your lawyer about it and see what he has to say but the final decision is yours, not his. Do you understand that?

THE DEFENDANT : Yes.

THE COURT: And the reason I'm telling you this is sometimes at the end of a trial later on we hear

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from some defendant "I thought I wasn't allowed to testify," you know, "I would have but he told me I couldn't" or some such thing. So, I want to -- I want to eliminate the possibility of that. So, is there anything that -- that -- that you don't understand or any questions you have about the fact that you have the absolute right to remain silent?

THE DEFENDANT: No.

THE COURT: Is there anything -- are there any questions you have?

THE DEFENDANT: No.

THE COURT: Are there any questions that you have about the fact that you have the absolute right to testify if you want to?

THE DEFENDANT: No.

THE COURT: And whose decision is that, yours or your lawyer's?

THE DEFENDANT: Mine.

THE COURT: Okay.

MR. PIERCE: As the Court knows, my client's been making a lot of the strategic decisions in this case.

THE COURT: I think he should. I think he should consult with his lawyer but the final -- in the final analysis it's his call.

MR. PIERCE: The only -- if -- then the Defense is not going to call any witnesses and so we'll be

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resting and asking to recess the trial until tomorrow so we can prepare for closing argument to -- in order to -- to put this stuff together coherently considering the lateness of the hour. It's 4:10 in the afternoon. Where I'm from Judges leave the building at quarter after 3, so.

THE COURT: This is not unusual here.

MRS. HANLIN: We're prepared to go forward and I'm not typically a long closer. I would be even less long if the Court instructs given the hour.

THE COURT: I'm not going to instruct anybody to do anything. I want everybody to do what they think needs to be done. I think it would be nice to finish today.

MR. PIERCE: My client wants to consult with some family members and advisors as to whether he really wants to testify or not and he can't do that in a couple of minutes. He wants to -- he would like to make that decision overnight.

THE COURT: He didn't need to do it in a couple minutes. He could have done it over the last couple of months.

MR. PIERCE: Well, Your Honor, we've seen the State's evidence now. So, of course that -- you know, that changes in some respects.

THE COURT: I mean, if he wants a few minutes to talk with you, that's fine. I'm assuming that's a

[p.229]

decision that's under consideration the whole time.

MR. PIERCE: So, the Court's inclination is to just go forward.

THE COURT: Right. Every time we turn around he's got some reason why he doesn't want to go forward and I'm ready to go forward unless you can put your finger on something important why I shouldn't.

MR. PIERCE: Okay. The -- I've noticed now in different jurisdictions courts actually vary on the order of argument or instructions. Do you still use the old traditional way of --

THE COURT: I'm not sure what that is.

MR. PIERCE: Argument first and then instructions last.

THE COURT: She's going to argue, you're going to argue, she's going to get a few minutes of rebuttal and then I'm going to do the instructions.

MR. PIERCE: Okay. I've actually seen cases where the instructions on the elements and all that stuff comes first, then the argument, then just the general charge.

THE COURT: No.

MR. PIERCE: You do it all at once.

THE COURT: Yeah.

MR. PIERCE: Okay. That's fine. Are we

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allowed in our -- in our remarks to at least make some illusions to the upcoming instructions?

THE COURT: Oh, absolutely.

MR. PIERCE: Okay.

THE COURT: And anything that you tell them I'm going to stay -- as long as you tell it to them accurately I'm going to stay out of your way.

MR. PIERCE: All right. Thank you, Your Honor.

THE COURT: Are we ready?

MRS. HANLIN: Yes.

THE COURT: Okay. So, I think the State still needs to rest in front of the jury. So, it will be rest, rest and then argument.

MRS. HANLIN: Okay.

- - -

(At 4:15 p.m. the Jury was brought into the courtroom and the proceedings continued as follows with all parties present in the courtroom.)

- - -

THE COURT: Okay. State, any further testimony?

MRS. HANLIN: No, Your Honor. On behalf of the State of Ohio we rest.

THE COURT: Defense.

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MR. PIERCE: State rests -- or, I'm sorry, the Defense rests.

THE COURT: Okay. Okay. Ladies and Gentlemen of the Jury, what we have -- part of what we did while you were gone was discuss scheduling here.

Our inclination is to get this case over with today. So, we're going to go straight to arguments, do the instructions of law, you will go deliberate unless somebody here has some reason why that shouldn't happen. You're all okay with that? This will avoid you having to come back tomorrow.

The way this works is the State does their arguments first, followed by the Defense. The State then has a few minutes to rebut any new material that the Defense brings up and then I read to you the instructions and you go deliberate. State.

MRS. HANLIN: Thank you, Your Honor. Good afternoon. First of all, thank you for the time and attention that you paid to this case. I realize it's been a long day. I told you this morning that I would be back in the afternoon to ask that you find Cornell Jones III guilty of trafficking in cocaine for making this trip to Detroit to get nearly 2 kilograms of cocaine and to bring it back to our community, that I would ask that you find him guilty of being a major drug offender for having over a thousand,

* * *

APPENDIX D

IN THE COURT OF COMMON PLEAS,
JEFFERSON COUNTY, OHIO

Case No. 07 CR 155A
Appeal No. 08 JE 29

[Dated July 3, 2008]

STATE OF OHIO)
PLAINTIFF)
)
Vs.)
)
CORNELL JONES, III)
DEFENDANT.)
)

- - -

APPEARANCES: ON BEHALF OF PLAINTIFF:
Ms. Jane Hanlin
Assistant Prosecuting Attorney
Jefferson County, Ohio

ON BEHALF OF DEFENDANT:
Mr. Frank Pierce
Attorney at Law
St. Clairsville, Ohio

- - -

TRANSCRIPT OF PROCEEDINGS
July 3, 2008

- - -

Transcript of proceedings of HEARING IN MITIGATION AND SENTENCING conducted in the above styled case, Courtroom #1, Common Pleas Court, Jefferson County, Ohio, before the Honorable Joseph J. Bruzzese, Jr., Judge.

Rebecca L. Wood
Official Court Reporter
Jefferson County Courthouse
Steubenville, Ohio 43952

* * *

[p.20]

never had a weapon, there was no violence, nobody was physically harmed, when he was arrested he docilely went with the police and made one minor complaint about the tightness of the handcuffs because he's a big guy. So he submitted himself to the legal system and that in and of itself, that acquiescence in being taken peacefully and saying all I want is my trial, that acquiescence I think deserves consideration.

Finally on the issue of remorse, it's very difficult for any criminal defendant who maintains his presumption of innocence to sit through a trial and act remorseful unless it's a case of negligence or accident where anybody could be remorseful. So I'm sure that somewhere in my client's psych he's very remorseful for what happened. However, you know the way things are and looking toward the future, toward the

possibility of an appeal, it's very difficult for him to express that openly to the Court.

So again I would ask that the Court consider a thirteen year sentence and consider that fair and just under the circumstances.

THE COURT: Thank you.

Mr. Jones, anything you have to say?

THE DEFENDANT: Yeah. I'd like to apologize to this Court, the City of Steubenville, Jefferson County, Judge, Jason, Jane, Teddy Kostecki. You guys really know

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what type of person I am. You know, I took care of you and Carrie, never had no problems. Come to Manfred's, Kristie, (inaudible). Said congratulations and good luck and you said I needed that when you got married. I took care your people at Brandt's. I think maybe your aunt, uncle, or mom and dad, had the Road Master and the Lincoln. I mean if you go back to them people and ask them, they'll tell you what type of person I am. That's all I have to say.

THE COURT: Okay. There are some things that I need to know and the first one is where did the drugs come from? I know Detroit but where in Detroit, and who?

THE: DEFENDANT: I couldn't tell you if my life depended on it.

THE COURT: That means you don't know or you won't tell?

THE DEFENDANT: I don't know.

THE COURT: Excuse me?

THE DEFENDANT: I don't know.

THE COURT: Okay. You understand that in a case like this there is a range this case is worth, you move up and down the range, and it would probably help you if you were to cough up a name that I believe. They probably already know but I don't know. You're not going to do that?

MR. PIERCE: Your Honor, can I say due to the nature of this type of crime for my client to make a public

[p.22]

disclosure of that kind could put his life in jeopardy. I'm not saying at some point in the future he can't work with --

THE COURT: I'm not going to sentence in the future. I'm not going to give him credit for telling and then hope he tells. I am open to lots of suggestions but I want to know who sent two kilo's into Jefferson County.

THE DEFENDANT: My client says he only has a nickname.

MS. KEENAN: Your Honor, we'll ask the Court to recall at trial the testimony through the tapes --

THE COURT: Supposed to be his cousin or something, right?

MS. KEENAN: -- said it was his cousin and that his cousin told him to dress like he was somebody and not dress like a thug.

THE COURT: So you need to come up with a name and one fairly quickly so I don't think you made it up. I need to know who it is.

THE DEFENDANT: I don't have a whole name.

THE COURT: You don't know your cousin?

THE DEFENDANT: It's not my cousin.

THE COURT: Who do you say it is?

THE DEFENDANT: His name was Dave. Listen, everybody always called everybody cousin instead of saying a name or something like that. I'm not making this up. I

[p.23]

can't even take you back there.

THE COURT: If this was some $20.00 buddy buy I would believe that maybe nobody knows who everybody is. But for $56,500.00 he knows whose hand he put it in. He knows whose hand he put two kilo's of cocaine in.

THE DEFENDANT: If I recall I think Staudacher said we pulled up on the street and it happened in the street. Right?

THE COURT: If you don't want to tell it's okay but we're going down you don't want to tell.

MR. PIERCE: Your Honor, can I say one more thing?

THE COURT: Sure.

MR. PIERCE: I have to tell you it's been my personal experience in working with Defendants in the African American community in Cleveland that it is indeed very common for these guys to refer to each other as cousin and not be related at all. That is an absolute fact. That's not him making that up. So it's very possible --

THE COURT: I don't dispute that but it's going to be a hard sell to me that he went from here to Detroit and randomly found somebody he didn't know who it was, put $56,500.00 in their hand, got up to Detroit, a five hour trip, up and back in about ten hours, so there was no messing around up there and it all kind of happened by

[p.24]

chance and by accident. Hard for me to buy that. If this was $20.00 buddy buy on Fourth Street I would buy all that but it's not that.

MR. PIERCE: My client continues to maintain he doesn't know the full name. Sometimes in these cases people deliberately mask --

THE COURT: Let's make it easier. The names on the ledger -- can't tell me you don't know that.

THE DEFENDANT: What do you want me to tell you?

THE COURT: I want to know who are they.

THE DEFENDANT: I can't do that in front of everybody.

THE COURT: Do we want a recess?

THE DEFENDANT: I'm sorry, I can't do that. You're asking me to put my life in danger.

THE COURT: We'll go to the easiest one of them all. Where's the BMW?

THE DEFENDANT: How do I get it to you?

THE COURT: Where is it?

THE DEFENDANT: Weirton.

THE COURT: Where?

THE DEFENDANT: Up on Weirton Heights.

THE COURT: Give me an address or name.

THE DEFENDANT: I don't have no address.

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THE COURT: Tell me how to get to it.

THE DEFENDANT: She'll get it. My wife will get it to you all.

MS. KEENAN: Your Honor, you have already entered an order that it be seized. If we can have knowledge of where it is we can send somebody to get it.

THE COURT: What street's it on?

THE DEFENDANT: I don't know the street it's on.

THE COURT: From here how do you get there?

THE DEFENDANT: Like you going toward Mountaineer.

THE COURT: Route 2. Go clear through Weirton? Pass the mill? Now we're out in the country again.

THE DEFENDANT: Like by the old hospital.

THE COURT: Is it in a building?

THE DEFENDANT: No, it's in a garage.

THE COURT: Who owns the garage?

THE DEFENDANT: My aunt.

THE COURT: What's her name?

THE DEFENDANT: Denise Brown.

THE COURT: That good enough to get it done?

MS. KEENAN: We can give it a shot. Otherwise I think that you can order pursuant to the

[p.26]

forfeiture statute, you can enter an order today ordering that it be produced. If it's not produced by a certain date and time you can order a deposition of the individuals who know where it is which may include his aunt or his wife.

THE DEFENDANT: She'll get it today.

THE COURT: Today would be good.

Let's get back to where the drugs came from. That's a biggy.

THE DEFENDANT: I can't. I told you I don't have a whole name for you.

THE COURT: There's a way you know how to get a hold of him. You were supposed to go Wednesday. That trip blew up and you went Friday. You have a way to get in touch with, contact, make arrangements.

THE DEFENDANT: I really don't have a contact. I don't have a way to get a hold of them. If you guys would've kept it out the news it might've happened. But you put it in the news and I can't get

ahold of the guy if my life depended on it. I'm telling you the truth.

THE COURT: One more shot -- names on the ledger.

THE DEFENDANT: I have to save my life and my family's life. You going to protect us?

THE COURT: You're going to be fairly hard to get to. I can't imagine anybody will be mad at your wife.

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At least one of these people brought $12,000 worth of cocaine into this community. Somebody kicked in twelve grand?

THE DEFENDANT: You tell me who the people is.

THE COURT: I'm going from the ledger that was in evidence.

THE DEFENDANT: I'm sorry, I can't help you.

THE COURT: I'd kind of like to know who it was that financed $12,000 of cocaine in Jefferson County.

THE DEFENDANT: If I recall on the testimony the officers followed the informant was in the car with me while I supposedly riding around getting money off co-conspirators. If you guys were following me --

THE COURT: I'm not asking them, I'm asking you.

THE DEFENDANT: I can't do that. I'm sorry.

THE COURT: Last round, anything additional from the State?

MS. KEENAN: No.

THE COURT: Mr. Pierce, anything additional?

MR. PIERCE: Just Your Honor, that I know the Court is disturbed by my client's inability or unwillingness to give full disclosure in the sentencing. I just want to emphasize this is a level of this business where people

[p.28]

really do get killed when they rat other people out and I think the Court needs to seriously take that into consideration.

THE COURT: Another thing I need to take into consideration is two kilo's of cocaine is enough to wreck a lot of lives here in this community. I want to know where it's coming from. If he doesn't want to tell that's fine but I'm not going to give him credit for telling what he won't tell.

MR. PIERCE: Sorry, Your Honor, I guess that's my client's position.

THE: COURT: All right. So where we are is first I want to address the plea offer the State made

because too much is being made out of that. A plea offer is some number that the State offered that I had nothing to do with. I am not even consulted on those. Typically a plea number starts fair and then gets a discount to eliminate risk, to eliminate expense, to eliminate a lot things. Whatever the Prosecutor's concept of fair is may or may not be what my concept of fair is. I would not have been limited to that agreed recommendation even if a plea had gone through. I'm certainly not going to be limited by it now. And whatever motivated it, whatever the State sought to gain by that plea offer didn't happen, time was spent, expense was spent, risk was incurred. Those are the typical

* * *

APPENDIX E

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

APPEAL NUMBER 08-JE-20
APPEAL NUMBER 08-JE-29
CASE NUMBER 07-CR-155A

[Dated September 10, 2008]

STATE OF OHIO	)
	)
Plaintiff	)
	)
vs.	)
	)
CORNELL JONES III	)
	)
Defendant	)
	)

- - -

TRANSCRIPT OF PROCEEDINGS

Wednesday, September 10, 2008

- - -

Transcript of Proceedings of the Motion for Reconsideration had in the above-captioned case heard on Wednesday, September 10, 2008, held in the

Common Pleas Court, Courtroom #1, with the Honorable Joseph J. Bruzzese, Jr. presiding.

- - -

Susan M. Schweiss
OFFICIAL COURT REPORTER
JEFFERSON COUNTY COURTHOUSE
STEUBENVILLE, OHIO 43952

* * *

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WHEREUPON, the Defendant, in order to maintain the issues on his part, called as a witness ROYAL MAYO, who after having been first duly sworn according to law, was examined and testified as follows:

EXAMINATION

BY MR. SCACCIA:

Q For the record, sir, I'd like your name.

A Royal Mayo.

Q And, Royal, what -- what -- do you mind if I call you Royal?

A No.

Q What do you do for a living? What is your involvement? How do you get -- what -- what do you do for a living?

A I'm the NAACP president here in the City of Steubenville. I'm also district coordinator and I supervise one-third of the presidents in the State of Ohio.

Q Okay. And how long have you held that position?

A As president, since January 1st, 2005. As district coordinator, since 2003.

Q And in the process of that position what are your duties?

A Basically to raise the standard of living for the people of color in the areas that I serve.

Q And what in the course of doing your duties and in

[p.13]

the course of administering your office and your vocation, do you have contact with the criminal justice system?

A Yes, I do.

Q And what kind of contact do you have with them? What is your interest with regards to that?

A Well, everywhere from -- from the very beginning, from arrests, investigations, prosecutions, plea bargains, sentencings, from beginning to end.

Q And in the course of that do you also have assistants that help you in the studies that you make?

A Yes, I do.

Q All right. Did you talk with me following Mr. Jones' sentencing regarding the issues that you were concerned about in the justice system?

A Yes, I did.

Q And what were those concerns?

A Well, basically disparity in treatment, the difference between the plea bargain he was offered and some of his co-defendants, the plea bargains they were offered.

Q For example.

A Mr. Blackburn getting a 2 year sentence when he provided absolutely no help and was actually defiant when he was here on Mr. Jones' sentencing -- or his trial.

Q Okay.

A And the fact that he received 2 years and pretty much

[p.14]

they were all in the same car with the same drugs and he received a 2 year sentence in a plea bargain deal. Mr. Jones' was offered 13 years.

Q What was that gentleman's name who was given the 2 years?

A Nicholas Blackburn.

Q All right. Now, aside from Mr. Blackburn was there any other people of Caucasians that were in the car?

A One other.

Q Who was that?

A Mr. Staudacher.

Q And do you know what Mr. Staudacher received?

A I believe 13 years.

Q Why were you concerned with -- I believe it was 10 to 13; isn't that correct?

A I'm not sure.

Q Okay. What was the concerns you had with regards to their sentencing and plea bargains as opposed to what Mr. Jones received?

A Well, through my communications Mr. Jones just seemed like he was the target and they were all caught -- the investigation seemed to be targeted at him but when they caught them all, nobody helped him. They caught them. They caught them red-handed. I figured they all should receive similar plea bargain offers.

[p.15]

Q All right. Did Mr. Jones have any prior criminal record that you're aware of?

A Not to my knowledge.

Q Okay. How about the other gentlemen? Do they have any prior criminal record?

A Not to my knowledge.

Q All right. You didn't study their backgrounds or anything like that?

A No.

Q Were there other people that you've also seen similar situations with regard to?

A You know, this isn't limited to Jefferson County or the City of Steubenville but the fact that about 50 percent of the prison population in this country is African-American, African-American men and we commit less crimes and we make up over 50 percent of the prison population is evidence in itself that there's something going on with the sentencing.

Q That being aside, what about the sentencing with coming out of Jefferson County and the plea bargains that have been issued to your knowledge?

A Well, two of the things that came to mind off the bat was that there was a couple bank robberies in Jefferson County here in the last I'm going to say five years. Both cases were less than 2 year sentences.

[p.16]

Q Okay. And I believe you indicated another instance where there was a gun involved or shootings involved?

A You know what, I don't have the information in front of me but --

THE COURT: If you brought it, you can get it because I don't -- whatever you have I want you to have so that you can know what you're --

A Well, let me -- let me say this. I believe the shooting he's speaking of was the attempted murder of a man in the county out Adena way and there was a part-time police officer from Belmont County who was dating the man's wife, followed the man home and had a plot with the man's wife to kill him, followed the man home and shot him and received a 4 year sentence and the disparity was there was a man named Quentin Dillard who was involved in a crime and someone was shot and he received -- I believe his initial sentence was 47 years but I think it's either 38 or 41 now.

Q Were there other instances that you've seen some disparity in treatment here in Jefferson County?

A The sentencing of Raymond Barnett, I think he received an 18-1/2 year sentence. Mike Simmons received a 15 year sentence. His cousin Cassius Hawkins received a plea bargain sentence of 15 years. There's -- there's -- there's a few more cases. John, do you have the -- do you have the actual affidavit?

[p.17]

MR. SCACCIA: Your Honor, if the Court has the one we filed, I want to make sure it's the one --

THE COURT: He can have in front of him whatever he would like.

MR. SCACCIA: Okay.

THE COURT: If he has documents, if he has notes, whatever he has he can have in front of him.

BY MR. SCACCIA:

Q Did you bring any documents with you?

A No.

Q You've mentioned in your affidavit a Tommy Jones -- a Tommy Mathews and a Joseph Duco?

A Those were the two bank robbers.

Q Okay. You also mentioned in your affidavit about jury selection. Have you been monitoring that or watching that at all?

A Out of the cases I've sat in on I've only seen one African-American juror actually seated in the jury.

Q And how many cases have you sat in on here in Jefferson County?

A I'm going to say in and out 15 to 20.

Q And on those cases were jurors in the pool?

A I've seen three in the pools.

Q And what happened with those individuals?

A For one reason or another they were not included in

[p.18]

the jury. Some people -- one lady here recently she just decided she knew the individuals. So, she was dismissed.

Q Were there other people in the jury pool who knew, for example, or had contacts with State witnesses or State actors or the prosecutor?

A Excuse me?

Q Were there other individuals who remained in the pool who had contact or who had known State individuals or witnesses for the State or State actors --

A Yes.

Q -- that were involved in this case?

A Yes.

Q Okay. In terms of the cases you monitored about how many cases have you looked at? Do you recall approximately?

A You know, to actually take a part the NAACP needs a formal complaint from the individual being prosecuted. So, there's a difference between actually monitoring a case and then actually taking part in the case where I would actually be talking with a person, getting information from the person. I'm not at liberty to do that unless I'm asked.

Q Explain the difference.

A Well, I can be in the courtroom and just be a person like some of the people here today and just actually see what's going on or I could be conversing back and forth with the person on trial and their families about actually what's

[p.19]

going on in their case.

Q And how does that difference affect what you -- what your understanding is or the circumstances in which you've arrived at your conclusions?

A Well, I'm not at liberty to really say anything about a case that I have nothing to do with as per the constitution of the NAACP. So, I'm kind of limited if I'm not a part of that actual case.

Q Okay. Now, based upon your circumstances that you studied here were you able to come to any conclusions at all with regards to the issues that were raised in the -- in your affidavit?

A Well, I felt before I became involved in the NAACP there was disparity in treatment, not only in Jefferson County but like I said before in the State of Ohio and in this country and I still feel that way. It's just I'm more closely involved with it now. So, now I'm in a position to where I want to actually see and study and get empirical work done to actually see the sentencing patterns and see the difference between plea bargains and see the difference in time based on race.

Q Are you in the process of gathering that information?

A Yes, I am.

Q And would you be able to be better situated to provide additional information to the Court at some later

[p.20]

date?

A Yes, I will.

Q When would you be able to accomplish that?

A Well, you know, John, it's going to be a long process --

Q Approximately.

A -- because we're talking about going over a 10 to 15 year period of every case prosecuted out of Jefferson County and it's going to take multiple volunteers. It's going to take a lot of man hours. It's going to take a lot of interviews. So, I've never done it before. I know it's been done before. So, I'm getting advice from other presidents from other -- other people who do what I do to see how that actually will work. So, I have no idea. I honestly couldn't give you a --

Q Ballpark figure, how long would you think -- do you have any idea of how long it would take let's say for the last three or last five years?

A Six months to a year.

Q Okay. Based upon the information that you studied do you have an opinion with regards to the treatment of blacks in the Jefferson County justice system?

A Disparity in treatment.

MR. SCACCIA: Thank you. No further questions at this time.

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THE COURT: Cross.

EXAMINATION

BY MRS. HANLIN:

Q Mr. Mayo, did you bring a copy with you today of the affidavit that was filed with the motion to reconsider in this case?

A No, I didn't.

MRS. HANLIN: May I approach, Your Honor?

THE COURT: Yes.

- - -

(Whereupon, State's Exhibit Number 1 was marked for purposes of identification.)

- - -

BY MRS. HANLIN:

Q Mr. Mayo, showing you what I've marked as Exhibit 1 on behalf of the State do you recognize that document?

A Yes, I do.

Q And can you tell me what it is?

A It's an affidavit.

Q And did you ask that that be filed in this case?

A I don't think this -- I don't know if this is the final -- the final -- I had about three or four of these. I was going back and forth with John. I'd have to look at it as compared to the one I actually filed. I'm not sure.

Q Is there a court stamp on that one?

* * *

[p.67]

Q We don't disagree at all that there were 2 kilos of cocaine found in his trunk; do we?

A No. That's a fact as -- as per the investigation but also there was three individuals in the car. One received 2 years, one 13 and one 16.

Q And as we've established --

A That's where we disagree.

Q -- you know nothing about the negotiations or the investigation that took place other than what you watched at trial.

A I'm going to find out. I'm going to find that out.

Q Well, we're here today, Mr. Mayo.

A It won't be today. It will be in Columbus and it will be another day.

MRS. HANLIN: Nothing further, Your Honor.

A Uh-huh. She's done?

THE COURT: Are you done?

MRS. HANLIN: Yes, sir.

THE COURT: Redirect.

MR. SCACCIA: My turn.

EXAMINATION

BY MR. SCACCIA:

Q Mr. Mayo, did you know Mr. Staudacher had a prior criminal record?

A No, I didn't.

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Q Could he have -- if he had a prior criminal record would that have made a difference in your mind in

terms of the plea bargain that was offered Mr. Jones who did not have a criminal -- prior criminal record and Mr. Staudacher did?

A Well, based on the education I received this morning from Ms. Keenan, that has a large bearing on what you offer in plea bargain deals. So, yes. There should be -- there should be some difference in their plea bargain deals.

Q Now, aside from that issue there, there's -- was a great deal of information concerned about drugs being found in Mr. Jones' vehicle; correct?

A Uh-huh.

Q When was the last time you heard of Mr. Big carrying the cocaine?

MRS. HANLIN: Objection, Your Honor. I have no idea who he's referring to at this point.

BY MR. SCACCIA:

Q All right. Major drug dealers, from your studies, your discussions with people in the community, have you talked about those issues and have you looked into those?

A Well, a person normally carry -- actually in possession of drugs is a runner, a person who -- who -- who you trust enough to give the money to, you trust enough to give you back the drugs, whoever they may be for.

Q All right.

[p.69]

A Normally the guy who -- who has the money, who has the ability, who has the connection so to say isn't the one actually going to pick it up and bringing it back in his car.

Q And why is that?

A Because he's not going to assume that risk, that liability of what Mr. Jones just got.

Q You hire somebody else to do that risk; correct?

A Exactly.

Q And that being said, when was the last time you saw a major drug dealer with the public defender?

A Never.

Q Who usually gets the public defenders?

A An economic-depressed individual, can't afford it and you have to pretty much sign off on it that you can't afford a paid attorney.

Q Okay. Let's go through some of these instances that were discussed. Do you have those exhibits if I may? Let's -- you were handed State's Exhibit Number 2. If I may approach the witness, Your Honor?

THE COURT : Sure.

MR. SCACCIA: Thank you.

BY MR. SCACCIA:

Q And in that it shows if you could please read under "Offense" what it says?

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A Count Two?

Q Yes.

A Felonious assault.

Q All right. Where's Count One? Does it say what Count One is?

A I don't see it.

Q All right. Does there have any reference to a gun specification at all?

THE COURT: Which one are we talking about?

MR. SCACCIA: Exhibit 2, Mr. Kessler.

A Kessler.

THE COURT: Kessler.

MR. SCACCIA: Yes.

BY MR. SCACCIA:

Q Is there any reference to a gun specification in that?

A No.

Q And Mr. Kessler was the one that was involved with the gun; wasn't he?

A Yes.

Q In fact, who controls -- or strike that. Who presents to the grand jury the charges and the evidence on which they should indict?

A I'm assuming the prosecutor's office.

Q And who presents plea bargains to individuals?

[p.71]

A Prosecutor's office.

Q All right. Thank you. If I may have that back. Does it say -- excuse me, one other thing. Does it say -- take a look at this document carefully and see if it has anything that says what Count One was.

A I don't know if it's listed but I don't see anything. I don't -- I don't see it if it's in here.

Q Okay. There was also a Mr. Flaherty. Tell us what you have found out or what you know or what you have learned or heard regarding Mr. Flaherty.

A You know, this is an example of what I was talking about about the plea bargain deals. Mrs. Hanlin kept referring to what the convictions were and that goes directly to what I was saying. The plea bargain deals are lighter on the people who aren't African-American. So, yeah, he was convicted of three counts of F-4 and one count of F-3. Mr. West wasn't given that opportunity. He was convicted of six Felony One counts and just like Mr. Harrison that was here earlier, instead of serving concurrent sentence, he serves one 10 year sentence, then he starts another 10 year sentence, then he starts another 10 year sentence. It's consecutive. That's how he got up to 60 years.

Q Now, just so we understand your position in this matter, you're not saying that blacks should be let go;

[p.72]

correct?

A Absolutely not.

Q All right.

A Everybody respects the rule of law. It's just when the law is overbearing on one group of people.

Q In other words, if I'm to understand correctly you're saying that there should be some standards that apply across the board to individuals in terms of plea bargains offered and in terms of the charges that have been imposed regardless of color.

A For sure and -- and -- and to go -- to go a step further, there's a -- there's a lady on the front of this

courthouse with a blind fold on that's holding a scale. That's symbolic of the scales of justice are going to be equal and justice is blind and we don't get that here and I'm not saying it's the judge. I'm not saying it's the prosecutor. I'm not saying it's the police department. I'm saying from beginning to end there's disparity in treatment all the way up until you get your sentence.

Q People need to pay more attention to what they're doing. Is that yes or no?

A For sure, yes.

Q All right. Now, across that board on that, with regards to the individual Mr. Flaherty, your information was basically that he had a --

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MRS. HANLIN: I'm going to object to this, Your Honor, unless he's got some evidence or some -- any kind of proof about --

A You know what --

THE COURT: Wait, wait, wait. Let's hear what the objection is.

MRS. HANLIN: He's asking him pretty much what did you hear Mr. Flaherty did.

THE COURT: Right. The hearsay is getting out of hand.

MR. SCACCIA: All right. Well, it's the basis upon which he's dealing with things but regardless --

THE COURT: Well, wait. Well, wait. I don't want to hear that either.

MR. SCACCIA: Okay.

THE COURT: When you file an affidavit it's supposed to be things you know.

MR. SCACCIA: Okay.

BY MR. SCACCIA:

Q Now, Mr. Flaherty got six months.

A I -- I think nine. Maybe it's six.

Q Let me give you that document back.

A Here it is. I have it.

Q Okay. What does it say that Mr. Flaherty got? What was his sentence? Last page.

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A Six months at Eastern Ohio Correctional Center.

Q And I believe the prosecutor represented to you that Mr. Flaherty had no prior convictions.

A Yes.

Q Did Mr. Jones have prior convictions?

A Not to my knowledge.

Q All right. And yet his plea bargain was the same as Mr. Staudacher's offer who got -- who has prior convictions to our knowledge.

A Yes.

Q And was substantially higher than Mr. Blackburn.

A Yes.

Q Okay. Do you have one of the exhibits up there?

A I have nothing here.

Q Do you have Mr. Duco's?

A Which exhibit are you --

Q Thank you. Mr. Duco. I'm going to hand you what's been marked as State Exhibit Number 6. Again, what offenses -- what counts is Mr. Duco being convicted of?

A Two, Three and Four.

Q All right. Does it say anywhere in there what Count One was?

A No.

Q All right. And again you had talked to individuals and they had indicated that he had had a gun with him at the

[p.75]

time that he walked into the bank and then walked out with a lot of money.

A I'm not sure how much money it actually was but yes, that's what I was made to believe.

Q All right. And --

A And also to go another step, I believe that -- and I'm not sure, I have to look it up, that the actual report given by the people who were robbed said that he indicated he had a gun.

Q Okay.

A I believe that that's -- that was part of it as well. I'll have to find that out though.

Q No one is trying to diminish the significance of drugs and problems that it creates in this country but how would you compare an armed robbery to a drug offense?

MRS. HANLIN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Again, this was a plea bargain offer; correct?

A Yes.

Q And it was less than what Mr. Jones received.

A Yes.

Q For an act of violence.

MRS. HANLIN: Objection, Your Honor.

THE COURT: Sustained.

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BY MR. SCACCIA:

Q What does your concerns about Mr. Flaherty go to?

A Well, it's just the disparity in treatment. I -- I -- I -- in my opinion all part of plea bargains is what you're going to have. That's why you have the jury selection and who's going to be sitting over there. The prosecution knows that I'm going to say 90 percent of the time there's going to be no African-Americans over there.

So, if you got an African-American male up for a charge his plea bargain can be a little bit longer as compared to a white individual because an African-American male, when you come over here, just like now, I'm on the witness stand and Mr. Jones, we're the only two African-Americans on this side of the fence and normally the only African-American on this side of the fence is the person sitting in this chair and they're the defendant.

So, you have nobody over there, no defense attorney, no prosecution, no judge, no court reporter, no reporters from the news station, nobody from the --

from any office, period, that's in any official capacity other than the Defendant.

So, when you -- when you go to make a plea bargain arrangement that's why jury selection is so important because you want a jury that's going to be sympathetic to what you're doing and so when you go to offer a plea, if you

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know who's going to be sitting over there, for instance, a school teacher who works for you, a guy who I sat in one day who said he was in law enforcement and he couldn't be unbiased towards law enforcement and he stayed over there.

So, when -- when you know you have those odds stacked in your favor it's a lot easier for you to say to a prosecutor -- to a defense attorney "Here's your plea."

Q And when you say "stay over there" you mean stay -- they stayed on the jury.

A Yes.

Q Okay. Is this -- there was also comment about one of the individuals who took a plea bargain and accepted it for 15 years or something like that.

A Yes.

Q How does what you're saying there play into that, if at all?

A Well, it was a 15 year sentence. I believe one of the things he did was he assaulted Mrs. Hanlin's husband at the scene of the crime.

Q Okay. Not a good thing?

A No and -- and further part of the deal was his wife wouldn't be prosecuted. So, he had some reason to accept the 15 year plea bargain deal because of what else was at stake. She wasn't prosecuted which was good for him. So, he was willing to take the 15 years to keep her out of it.

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Q But your concern is? How does that play into the racial concerns that you raise here?

A Well, because his plea bargain was for 15 years and to me again drugs are serious but nowhere near as serious as shooting a person, not in my eyes. I mean, you know, normally when you just have a gun you get a higher specification for your crime because you could shoot someone. So, to me shooting a person has to be more serious than the other offenses.

Q Well, what's the problem that if Mr. Hawkins agreed to the plea bargain?

A The plea bargain was too long. The plea bargain was too long and the fact that they know they had him and he know he had him and he just got off of a 15 year sentence a year, a year-and-a-half prior to that. So, you know, he just went on and laid down for 15 more years because he didn't want his wife prosecuted.

Now, that's my understanding from the people in his family.

Q Are you suggesting it appears that unequal plea bargains are --

A Yes.

MR. SCACCIA: Okay. I have no further questions at this time, Your Honor.

THE COURT: Any recross?

- - -

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EXAMINATION

BY MRS. HANLIN:

Q You talked about how you know about runners and how drugs are brought back to the area; is that right?

A No, not to the area. I have no idea about that. I'm on -- on the broad sense of things.

Q So, when you're talking about your knowledge of runners and who goes and gets the drugs you are or are not talking about Jefferson County?

A No, everywhere.

Q Everywhere including Jefferson County?

A Yes.

Q Okay.

A Just -- just the normal drug culture.

Q Okay. How do you know that?

A Perception.

Q Perception.

A Perception.

Q You have no facts with you today.

A No. I don't use drugs. I don't sell drugs. I don't have any -- any involvement.

Q But you sat through Cornell Jones' trial; didn't you?

A Yes.

Q We agreed that it was Cornell's car.

A Yes.

* * *

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drink whatever you want.

MR. SCACCIA: Okay. Thank you. Call Mrs. Hanlin.

- - -

WHEREUPON, the Defendant, in order to maintain the issues on his part, called as a witness JANE HANLIN, who after having been first duly sworn according to law, was examined and testified as follows:

EXAMINATION

BY MR. SCACCIA:

Q Mrs. Hanlin, for the record your name and occupation?

A My name is Jane Hanlin. I'm an assistant prosecuting attorney in Jefferson County and I also have a private law practice.

Q What private law firm are you operating out of?

A Bruzzese and Calabria.

Q Is it a relationship to the Bruzzese -- it's not the Judge Bruzzese here; is it?

A Judge Bruzzese's brother Frank Bruzzese is a partner --

Q Okay.

A -- in that law firm. Judge Bruzzese is not.

Q All right. You mentioned in the course of your examination of Mr. Mayo a Ray Burnett or Barnett and you said he had an African-American in the jury?

[p.94]

A He did.

Q How do you know this?

A I was the prosecutor who prosecuted Mr. Barnett.

Q And did you take notes about who was in the jury at the time?

A No. The individual's name was Mr. Gillison. He's a local resident here in Steubenville. I recall him sitting on the jury.

Q Do you recall any other individuals that were sitting in any of the juries that you impaneled who are African-American?

A That were impaneled? No. I recall in Mr. Jones' case there was an African-American woman in the pool who asked not to be part of the jury. She was not attempted to be stricken by me nor by defense counsel. She personally knew Mr. Jones III and didn't feel that she should be a juror in that case for that reason.

Q And she was let go.

A By agreement of the prosecutor and defense counsel.

Q Why would defense counsel agree to leave somebody off the jury who could -- who knew Mr. Jones?

A Perhaps he had an interest in fairness. The woman said that she couldn't be a fair juror in this case.

Q And that's exactly how you recall her statements?

A She knew him. She said she -- she very personally

[p.95]

knew him. It wasn't as though she knew him in passing.

Q Wasn't there also a juror whose wife worked for the board in which you are chair of or member of?

A In --

Q Mr. Jones' jury.

A -- Mr. Jones' case?

Q Yeah

A I remember there might have been an individual who was married to a teacher.

Q Yeah, something like that. And didn't you -- did you ask that individual and mention to the individual you might be the boss of that teacher, his wife?

A No.

Q Okay. That didn't come out.

A No.

Q Okay.

A I disclosed that I was a member of the board of education and asked whether that affected him -- his impartiality at all. He responded that it did not.

Q Now, with regards to Mr. Burnett -- or Barnett, that's the only African-American on an impaneled jury that you recall being involved with; correct?

A That I can recall, yes.

Q All right.

A No. I'm sorry. Actually it's not. There was a

[p.96]

pastor, I believe his last name is Hood, who was impaneled in the jury involving the case of State of Ohio versus Stephen McCain.

Q And that is correct and I have that. There's no trick questions here. I'm not trying to trick you but I do have -- so two juries -- how long have you been a prosecutor?

A Since January of 2005.

Q And during that time how many cases have you tried?

A Me personally?

Q Yeah.

A I'm not sure.

Q Ballpark. How many have you tried this year?

A I honestly don't know.

Q More than ten?

A I don't -- I doubt more than ten this year.

Q Have you tried more than ten in the course of your history as a prosecutor?

A Yes.

Q More than 20?

A I don't believe so, probably somewhere around that number.

Q Between 10 and 20?

A I think that's fair to say. I don't know an exact number.

[p.97]

Q Okay. Were you able to find out exactly how many?

A Not from right here.

Q I understand that but what you're suggesting is that in approximately somewhere between 10 and 20 jury trials you've only been involved in two cases in which a black juror was actually impaneled; correct?

A That I can recall, yes.

Q All right. And out of those two cases one resulted in a finding of a hung jury?

A Mr. McCain.

Q And the other one was a guilty verdict.

A Correct.

Q So, you're batting about 500.

A I don't judge them that way.

Q I'm not suggesting that but based upon what's impaneled it has been about a 500 average; correct?

A Of the two that I can recall Mr. McCain's trial resulted in a hung jury. He later pleaded guilty. Mr. Jones was convicted.

Q All right. Now, did he plead guilty on a plea bargain?

A Yes.

Q All right. And now that all being said, of the remaining cases in which you tried as a prosecutor what's your conviction rate?

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A Overall in the cases, I can remember Mr. McCain's case being a hung jury. I can remember a couple of trials where there -- the defendant might have been

guilty of a lesser offense but in all of the cases other than Mr. McCain's that I have prosecuted there has been a guilty verdict at least to some portion of the indictment.

Q All right. So, you batted about a hundred percent on the rest.

A Or less.

MR. SCACCIA: All right. Hold on one second. If I may have one moment, Your Honor.

THE COURT : Sure.

BY MR. SCACCIA:

Q That other juror that you mentioned who was African-American, Mr. Gillison?

A Yes.

Q He's also a teacher as well; isn't he?

A Not to my knowledge.

Q All right. Could he have been?

A I don't know.

Q All right. Now, let's turn to --

A Oh, let me correct you. If Mr. Mayo is attempting to impart to you information that was Lee Gillison that works at the school, he's incorrect. The gentleman's first name I now recall was Eugene Gillison.

[p.99]

Q Okay.

A Not the same individual who is a teacher in the schools if that's where you're going.

Q I just wanted to know that. Thank you.

A The individual that was on the jury was an elderly Mr. Gillison. I don't have any idea what his occupation was.

Q Or who he's related to.

A No clue.

Q Okay. Now, with regards to this case here, Mr. Blackburn, what did you get from Mr. Blackburn?

A What did I get from Mr. Blackburn?

Q Yeah.

A On behalf of the State of Ohio?

Q Uh-huh.

A Information that was provided to the police along with information that was provided to the prosecutor's office.

Q With regards to Mr. Jones or other cases?

A Both.

Q All right. And was Mr. Jones asked-- told that if he gave information to the police, the prosecutor's office he would be only looking at 2 years?

A They weren't charged the same.

Q Why weren't they charged the same?

[p.100]

A Why weren't they --

Q Yeah.

A Why weren't Mr. Jones and Mr. Blackburn charged the same?

Q Yeah.

A Because their involvement in the crime was different. As a result of the investigation and the information that was presented to the prosecutor's office, their involvement in the crime was different.

Q And that information came from whom?

A The officers that were involved in the investigation, the confidential informant, the co-defendants, all of the evidence that was forwarded from the police department to the prosecutor's office.

Q Okay. Let's -- and what about Mr. Studebaker?

A I don't know a Mr. Studebaker. I assume you are referring to Thomas Staudacher who --

Q Staudacher. Excuse me. I can't read my own handwriting. Mr. Staudacher, he was offered 10 to 13 years?

A No.

Q Or 13 years. Why?

A He was offered 13 years, not 10 to 13.

Q Okay. And why?

A In part because of his in -- his cooperation in the case.

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Q All right. What cooperation did you get from Mr. Staudacher?

A Information about the offense that happened that night.

Q All right. What cooperation did you get from Mr. Blackburn?

A I already answered that question.

Q With regards to Mr. Jones.

A Information about this case and about others.

Q Okay. And with regards to -- I take it that Mr. Blackburn and Mr. Staudacher pointed at Mr. Jones and said he's the guy.

A They talked about what happened that night, how the arrangements were made to go to Detroit to get the 2 kilos of cocaine, where the cocaine came from, the process that Mr. Jones was going through of rounding up the money to get the cocaine. I know that you weren't the trial counsel but the basic summary of the case was that Mr. Jones was traveling to Detroit to get $56,000 worth of cocaine. He was having trouble coming up with that amount of money from his local customers and that's how Mr. Blackburn and Mr. Staudacher became involved. They were individuals who chipped in some of the $56,000 but the lion's share of the $56,000 came from your client and his other sources.

Q And this came from the testimony of Staudacher and --

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or the information from Staudacher and Blackburn; correct?

A No. It came in part from the information that was received from Staudacher and Blackburn. It came in part from the confidential informant. The calls between the confidential informant and Mr. Jones were recorded. The meetings between the two of them were recorded.

Q Was the confidential informant a police officer in West Virginia?

A No and she was disclosed to the defendant early on in the discovery process as a former girlfriend of his.

* * *